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No. 98-

In the

Supreme Court of the United States

OCTOBER TERM, 1998

In the Matter of JOHN S. TAMAGNI et al.,

Petitioners,

vs.

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether New York's personal income tax scheme, which exposes individuals domiciled in other states to multiple taxation by taxing them as New York residents when they cross state lines to engage in a specified level of New York activity, is subject to Commerce Clause scrutiny?

B. Whether New York's personal income tax violates the "internal consistency" requirement of the Commerce Clause by including in its definition of "residents" nondomiciliaries who engage in a specified level of New York activity, when adoption of such a taxing regime by every state (as many states have already done) would subject such individuals to a greater tax burden than taxpayers who confine their activity to a single state?

STATEMENT PURSUANT TO RULE 29.6

None of the parties to this action have parent or subsidiary corporations.

PARTIES TO THE ACTION BELOW

John S. Tamagni and Janet B Tamagni, Petitioners

Tax Appeals Tribunal of the State of New York
and the Commissioner of Taxation and Finance
of the State of New York, Respondents

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PETITION FOR WRIT OF CERTIORARI

I. PRELIMINARY MATTERS

A. Opinions Below

The opinion of the New York Court of Appeals is reported as *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530; 695 N.E.2d 1125; 673 N.Y.S.2d 44 (1998) and is reproduced in the Appendix at pages A-1 to A-28. The opinion of the Appellate Division of the New York Supreme Court is reported as *Tamagni v. Tax Appeals Tribunal*, 230 A.D.2d 417; 659 N.Y.S.2d 515 (3d Dep't 1997) and is reproduced in the Appendix at pages B-1 to B-5. The opinion of the New York Tax Appeals Tribunal, which is not officially reported, is reproduced in the Appendix at pages C-1 to C-65. The

opinion of the Administrative Law Judge of the Division of Tax Appeals, which is not officially reported, is reproduced in the Appendix at pages D-1 to D-67.

B. Jurisdiction

The judgment of the New York Court of Appeals was entered on May 14, 1998. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

C. Constitutional and Statutory Provisions Involved

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides that "[t]he Congress shall have power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Relevant portions of the New York Tax Law § 605(b)(1) and of the New York City Administrative Code § 11-1705(b)(1) are set forth in the Appendix at pages F-1 and G-1 respectively.

II. STATEMENT

A. Relevant Facts

Petitioners, John and Janet Tamagni, reside in Summit, New Jersey, having moved there in 1979. They had their true home there, raised their children there, and lived there throughout the entire period at issue (1987-89). There is no question that the Tamagnis were domiciled in New Jersey – and not New York – during the years at issue.

Mr. Tamagni is an investment banker and a member of the firm of Lazard Freres. He has worked at the firm's main office in New York City for 21 years. In this capacity, Mr. Tamagni's daily activities included meeting with clients in New York, New Jersey, and around the country, drafting reports in connection with efforts to raise money for clients, and dealing with the sales and trading operations within Lazard Freres.

During the years at issue, the Tamagnis owned a cooperative apartment located in New York City which they used only occasionally. The Tamagnis purchased this apartment in 1986 and maintained it to provide a place for Mr. Tamagni to spend the night if he needed to work late and to reduce the rigors of commuting to his New York employment from Summit, New Jersey.

B. New York's Taxing Scheme

New York imposes its personal income tax on the income of residents from all sources, Tax Law §§ 601, 611, 612, and on the income of nonresidents from sources within the state. Tax Law §§ 601 and 631.[1] A resident individual is defined as an individual:

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[1] The Tamagnis were classified as statutory residents of both New York State and New York City during some of the years at issue. New York *(Footnote Continued on Following Page)*

> (A)who is domiciled in this state, ... or
>
> (B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty three-days of the taxable year in this state, unless such individual is in the armed forces of the United States.

Tax Law § 605(b)(1). In counting the number of days spent within New York under Tax Law § 605(b)(1)(B), presence within New York *for any part* of a calendar day constitutes a day spent within the state (even if the presence is for a half-hour meeting), unless the presence is solely for the purpose of boarding a plane, ship, train, or bus for travel outside New York or while traveling through New York to an out-of-state destination. N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(c).

Although New York allows residents a credit against their New York personal income tax, the credit is strictly limited to "any income tax imposed for the taxable year by another state of the United States, a political subdivision of such state ... upon income *both derived therefrom* and subject to tax under this article." Tax Law § 620(a) (emphasis added). Accordingly, the only income for which this credit is available is "income derived from sources within another state [or] political subdivision of another state." 20 N.Y.C.R.R. § 120.1(a). "Income derived from sources within another state [or] political subdivision" is limited to the same type of income deemed "derived from or connected with New York sources" for purposes of determining the adjusted gross income of a nonresident individual. 20 N.Y.C.R.R. § 120.4(d). Regulations §§ 132.2 through 132.11 delineate the type of income deemed "derived from or connected with

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City's definition of a statutory resident is identical to the State's definition. N.Y.C. Admin. Code §§ 11-1701, 11-1705(b)(1). Because both the City and the State statutes suffer from the same constitutional infirmities, petitioners challenge both statutes in this Court.

New York sources." Based on this definition, a credit for taxes paid to other states is allowed only for:

> income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction.

20 N.Y.C.R.R. § 120.4(d). Consequently, no credit for taxes paid to another jurisdiction is allowed for "tax imposed by another jurisdiction upon income from intangibles." *Id.* Nor is a credit "allowable for an income tax of another jurisdiction on dividend income not derived from property employed in a business, trade or profession carried on in such jurisdiction." Id. As a result of this limited definition, the credit is available only on specific, narrow items of income earned by residents while other types of income are then subject to "resident" taxation in more than one state.

C. Similar State Taxing Schemes

The petitioners' situation is not unique or singular in nature. The potential for this multiple taxation result is significant because at least fourteen states already impose a taxing scheme with identical or similar language to the New York "resident" definition and credit provision.[2] Moreover,

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[2] Arkansas (Ark. Code § 26-51-102(9) (resident is defined as "any person domiciled in the State of Arkansas and any other person who maintains a permanent place of abode within [Arkansas] and spends in the aggregate more than six (6) months of the taxable year within" Arkansas) and Ark. Code § 26-51-504(a)(1) (a credit "shall then be given on the tax as so computed, for the amount of income tax actually owed by the resident for the year to any other state or territory *on account of income from property owned or business transacted in the other state or territory*.") (emphasis added)); Colorado (Colo. Rev. Stat. § 39-22-103(8) ("'Resident individual' means a natural person who is domiciled in [Colorado] and a natural person who maintains a permanent place of abode within

(Footnote Continued on Following Page)

[Colorado] and who spends more than six months of the taxable year within" Colorado) and Colo. Rev. Stat. § 39-22-108 (the credit "shall not exceed the same proportion of the tax ... which the taxpayer's federal taxable income *from the sources within such state, the District of Columbia, or a territory or possession of the United States* bears to his entire federal taxable income for the same period")); Connecticut (Conn. Gen. Stat. § 12-701(a)(1) (resident is defined to include certain domiciliaries and any natural person who "maintains a permanent place of abode in [Connecticut] and is in the state for an aggregate of more than one hundred eighty-three days of the taxable year") and Conn. Gen. Stat. § 12-704(a) (a credit is allowed "in the amount of any income tax imposed ... by another state of the United States or a political subdivision thereof or the District of Columbia or any province of Canada *on income derived from sources therein*") (emphasis added)); Delaware (Del. Code § 1103 (a resident individual is defined to include certain domiciliaries and any individual "[w]ho maintains a place of abode in [Delaware] and spends in the aggregate more than 183 days of the taxable year in" Delaware) and Del. Code § 1111(a) (a credit is allowed "for the amount of any income tax imposed ... for the taxable year by another state of the United States, or the District of Columbia, *on income derived from sources therein*") (emphasis added)); District of Columbia (D.C. Code § 47-1801.4(17) (resident is defined to include domiciliaries and "every other individual who maintains a place of abode the District for an aggregate of 183 days or more during the taxable year") and D.C. Code § 47-1806.4(a) (a credit is allowed for "the amount of individual income tax ... paid to any state, territory or possession of the United States, or political subdivision thereof, *upon income attributable to such state, territory or possession of the United States, or political subdivision thereof*") (emphasis added)); Idaho (Idaho Code § 63-3013(1) (resident is defined to include domiciliaries and any individual who "[m]aintains a place of abode in [Idaho] for the entire taxable year and spends in the aggregate more than two hundred seventy (270) days of the taxable year in" Idaho) and Idaho Code § 63-3029 (1) (a credit is allowed "for the amount of any income tax imposed ... by another state *on income derived from sources therein*") (emphasis added)); Louisiana (La. Rev. Stat. § 31(1) (domiciliaries and "every other natural person who maintains a permanent place of abode within [Louisiana] or who spends in the aggregate more than six months of the taxable year within [Louisiana,] shall be deemed to be a resident of" Louisiana) and La. Rev. Stat. § 33 (a credit is allowed "for taxes paid to [another] state on income which is taxable under its laws irrespective of the residence or domicile of the recipient") (emphasis added)); Maine (Me. Rev. Stat. § 5102.5. (resident is defined to include domiciliaries and any individual who "maintains a permanent place of abode in [Maine] and spends in the aggregate more

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than 183 days of the taxable year in" Maine) and Me. Rev. Stat. § 5217.A (a credit is allowed for "the amount of income tax imposed [by a taxing jurisdiction] *with respect to income derived from sources in that taxing jurisdiction*") (emphasis added)); Missouri (Mo. Rev. Stat. § 143.101.1 (resident is defined to include domiciliaries and any individual who "maintains a permanent place of abode in [Missouri] and spends in the aggregate more than one hundred eighty-three days of the taxable year in" Missouri) and Mo. Rev. Stat. § 143.081.1 (a credit is allowed "for the amount of any income tax imposed ... by another state of the United States (or a political subdivision thereof) or the District of Columbia *on income derived from sources therein*") (emphasis added)); North Dakota (N.D. Cent. Code § 57-38-01.6 (resident is defined to include domiciliaries and "any other person who maintains a permanent place of abode within [North Dakota] and spends in the aggregate more than seven months of the income year within" North Dakota) and N.D. Cent. Code § 57-38-04.2.a (a credit is allowed which shall not "exceed the proportion of the tax ... that the amount of the taxpayer's adjusted gross income *derived from sources in the other taxing jurisdiction* bears to the taxpayer's adjusted gross income as computed" under the Internal Revenue Code) (emphasis added)); Oregon (Or. Rev. Stat. § 316.027 (resident is defined to include domicilaries and any other individual who "maintains a permanent place of abode in [Oregon] and spends in the aggregate more than 200 days of the taxable year in" Oregon) and Or. Rev. Stat. § 316.082(1) (a credit shall be allowed for "the amount of any income tax imposed ... by another state of the United States or the District of Columbia *on income derived from sources therein*") (emphasis added)); Utah (Utah Code § 59-10-103(j) (resident is defined to include domiciliaries and any individual who "maintains a permanent place of abode in [Utah] and spends in the aggregate 183 or more days of the taxable year in" Utah) and Utah Code § 59-10-106(1) (a credit is allowed for "the amount of tax imposed ... by another state of the United States, the District of Columbia, or a possession of the United States, *on income derived from sources therein*") (emphasis added)); Vermont (Vt. Stat. tit. 32, § 5811(11) (resident is defined to include domiciliaries and any individual who "maintains a permanent place of abode within [Vermont] if the individual both maintains a permanent place of abode and is present in [Vermont] for more than an aggregate of 183 days of that taxable year") and (Vt. Stat. Ann. tit. 32 § 5825) (credit for taxes paid to other states on income earned or sourced in that state); Virginia (Va. Code § 58.1-302 (resident is defined to include domiciliaries and "every other person who, for an aggregate of more than 183 days of the taxable year, maintained his place of abode in Virginia") and (Va. Code § 58.1-332) (credit for taxes paid to other states on earned or business income sourced in that state); West Virginia (W. Va. Code § 11-21-7 (resident is defined

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because there are approximately four million interstate "tax commuters" currently – and the number appears to be increasing – the incidence of multiple taxation is a common and severe problem.[3]

D. Proceedings Below

John S. and Janet B. Tamagni timely filed New York nonresident personal income tax returns for the 1987, 1988, and 1989 taxable years. As nonresidents, the Tamagnis paid New York personal income tax on their New York source income.

On July 6, 1992, the Division of Taxation of the New York State Department of Taxation and Finance sent a Notice of Deficiency to the Tamagnis assessing additional taxes, interest, and penalties for tax years 1987, 1988, and 1989.[4] The proposed deficiency was based on the Division's determination that Mr. Tamagni had spent *some part* of more than 183 days in New York during each of the years at issue and had also maintained a permanent place of abode there (although it was used only occasionally) and therefore met one of the definitions of "resident" (hereinafter "statutory resident"). Such a classification subjected Mr. Tamagni to tax on all of his income as if he were a New York domiciliary.

The Tamagnis timely filed a petition for an administrative hearing on October 5, 1992, asserting that Mr. Tamagni was

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to include domiciliaries and any individual who "maintains a permanent place of abode in [West Virginia] and spends in the aggregate more than one hundred eighty-three days of the taxable year in" West Virginia) and W. Va. Code § 11-21-20(a) (a credit is allowed for "any income tax imposed ... by another state of the United States or by the District of Columbia, *upon income ... derived therefrom.*") (emphasis added)).

[3] David Schultz, *State Tax Commuters: Classifications and Estimates*, State Tax Notes, August 10, 1998, p. 355.

[4] The total income tax due for the three years asserted in the Notice of Deficiency was $192,541.22, plus penalties and interest. Pet. App. at D-8.

not a statutory resident, and that, even if he were a statutory resident, the definition of statutory resident, as applied to the Tamagnis, is unconstitutional under the United States and New York Constitutions. On August 25, 1994, the administrative law judge issued his determination finding that Mr. Tamagni was a statutory resident for some of the periods at issue and was not a statutory resident for other periods. Pet. App. at D-64. The administrative law judge did not reach the Tamagnis' constitutional challenges because he determined that the Division of Tax Appeals did not have jurisdiction to adjudicate these challenges. Pet. App. at D-65 n.18.

On September 22, 1994, the Tamagnis sought review, before the New York State Tax Appeals Tribunal, of that part of the administrative law judge's determination that held them to be statutory residents during certain of the years at issue and that part of the determination that held that the administrative law judge did not have jurisdiction to rule on their constitutional claims. The Tribunal affirmed the administrative law judge's decision as to whether Mr. Tamagni was a statutory resident during the years at issue. Pet. App. at C-65. The Tribunal did not address the question whether Tax Law § 605(b)(1) was constitutional under the Commerce Clause because it determined that the taxpayers had not made a preliminary showing that the Commerce Clause applied to the situation at issue. Pet. App. at C-61.

On March 29, 1996, the Tamagnis filed a petition with the Supreme Court of the State of New York, Appellate Division, Third Department for review of that part of the Decision of the Tax Appeals Tribunal addressing the constitutionality of the tax statute. On June 19, 1997, the Appellate Division issued its Opinion and Judgment confirming the Tribunal's determination. Pet. App. at B-5. The Appellate Division determined that the Commerce Clause was not implicated because (1) the practice of commuting does not produce the requisite effect on interstate commerce and (2) maintaining a residence and purchasing goods and services in a jurisdiction where one does not live does not involve interstate commerce. Pet. App. at B-3, B-4.

As a result of determining that the Tamagnis' activities did not implicate the Commerce Clause, the court did not reach the question whether the tax violated the substantive rules of the Commerce Clause.

On July 17, 1997, the Tamagnis filed a Notice of Appeal with the New York Court of Appeals. On May 14, 1998, the Court of Appeals issued its Opinion and Judgment, with Judge Titione dissenting, affirming the Appellate Division's Judgment. The court recognized that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation [under the dormant Commerce Clause] as when relied on to support some exertion of federal control or regulation." Pet. App. at A-7 (quoting Camps *Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2) (brackets in original)). The court further observed that "if the tax at issue 'substantially affects' interstate commerce, such that congressional legislation limiting the State taxing power would be a valid exercise of its Commerce Clause powers, then the Commerce Clause is implicated." Pet. App. at A-7 (citation omitted). The court also noted that "the Supreme Court has shown little inclination to limit Congress' powers as delineated by the Commerce Clause." Pet. App. at A-7.

Nevertheless, the court found that New York's taxing scheme did not substantially affect interstate commerce on the ground that the Commerce Clause only restricts state taxes affecting economic activity and that New York's tax "is imposed solely based upon [the taxpayer's] presence and maintenance of abode in New York without regard to any economic activities incidental to his presence here." Pet. App. at A-9. The court did not indicate why Mr. Tamagni's crossing state lines to engage in economic activities in New York had less of an economic impact on interstate commerce than did the movement of people across state lines that has been subject to Commerce Clause scrutiny in other cases (*see, e.g., Camps Newfound, supra*; *Edwards v. California*, 314 U.S. 160, 172 (1941)). Nor did it explain why rental or ownership of real property in New York – an essential

predicate for subjecting Mr. Tamagni to tax – did not constitute "economic activity."

Despite its conclusion that the Commerce Clause did not apply to the New York personal income tax, the court below proceeded to consider and reject petitioners' substantive Commerce Clause claim on the assumption that the Commerce Clause was indeed applicable to that claim. The court, invoking this Court's recent decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), reasoned that "[b]ecause the tax at issue does not operate to the disadvantage of any identifiable interstate market, but rather simply taxes residents based on their status as residents, it does not violate the dormant Commerce Clause." Pet. App. at A-11, A-12. The court was unwilling to consider the impact that taxation of petitioners had on the interstate real estate market or on the interstate labor market because the tax was not imposed on those markets "per se" (Pet. App. at A-12) and were, in the court's eyes, "incidental at best." Pet. App. at A-12. The court also made no effort to reconcile its conclusion with this Court's pronouncement that "we have never recognized a 'de minimis' defense to a charge of discriminatory taxation under the Commerce Clause." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 n.3 (1996).

The court also dismissed petitioner's argument that New York's statute was internally inconsistent. The court did not take issue with the taxpayers' contention that the New York statute, if enacted by every state, would in fact place a greater burden on taxpayers like Mr. Tamagni (who is domiciled in one state and works in another where he maintains an abode) than taxpayers who confine their activities to a single state. Rather, the court concluded that the internal consistency test simply did not come into play because the tax at issue fell on "a separable local occurrence as opposed to an interstate activity." Pet. App. at A-15.

In his dissenting opinion, Judge Titione took the majority to task both for its failure to conclude that petitioners' claim was subject to Commerce Clause scrutiny and for its

conclusion that New York's tax passed muster under substantive Commerce Clause criteria. The dissent observed that the "case law is replete with examples" of "[p]urely in-state taxes" that substantially affected interstate commerce (Pet. App. at A-19), citing numerous opinions of this Court subjecting "local" levies to Commerce Clause scrutiny including *Camps Newfound*, *supra* (reviewing under Commerce Clause local property tax on summer camps); *Fulton Corp.*, *supra* (reviewing under Commerce Clause local intangible property tax on state residents); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (reviewing under Commerce Clause local severance tax on extraction of coal). Indeed, the dissent pointed to this Court's decision in *Edwards v. California*, *supra*, which specifically held that the movement of people across state borders for economic purposes implicates interstate commerce. Pet. App. at A-20.

Judge Titione likewise concluded that the court had erred on the merits. Observing that this Court has repeatedly held that a tax must pass the test of internal consistency to survive Commerce Clause scrutiny, and that the test requires the hypothetical replication of the challenged tax in all states to determine whether it will expose interstate commerce to risk of multiple taxation, the dissent had little difficulty concluding that

> [t]he New York tax scheme fails that test. Assuming that all other states adopted New York's tax law, there would be the risk of multiple taxation of a taxpayer's income from intangible assets. If New York's tax law applied in all states, an individual who spent a portion of over 183 days in three states and maintained a residence in each of these three states would have to pay tax on their income from intangible assets in all three. Multiple taxation is the event to be avoided, but New York has not avoided that risk in its tax law.

Pet. App. at A-23.

As to the majority's suggestion that the Commerce Clause did not apply because there was no discrimination against petitioners in any identifiable market (Pet. App. at A-11), relying on *General Motors Corp. v. Tracy*, *supra*, the dissent pointed out that

> New York discriminates against out-of-state participants in its labor and property markets because the risk attendant on the participation are not borne by both New York and out-of-state domiciliaries: New York domiciliaries have an advantage in that their working and having a place to live in New York would not risk multiple taxation.

Pet. App. at A-24 n. 12.

III. REASONS FOR GRANTING THE PETITION

A. The Issue Presented Herein is One of Vital Importance to Countless Individuals Across the Country

This case raises a question of considerable theoretical and practical significance with respect to the protection that the Commerce Clause affords taxpayers who live in one state and work in another. The personal income tax laws of many states treat two categories of taxpayers as residents: (1) taxpayers who are domiciled in the state and (2) taxpayers who are not domiciled in the state, but who spend a specified amount of time and/or maintain a specified level of presence in the state (e.g. an abode, even if used only occasionally). Once classified as a resident, a taxpayer is subject to tax on all of his or her income, earned and unearned, regardless of its source. Although states provide credits for the taxes that their residents pay to other states, such credits frequently extend only to taxes imposed on income that has its source in other states.

The result of this widespread statutory pattern is to expose many interstate commuters to the risk of multiple taxation. For example, a taxpayer who lives in one state but works and maintains an abode in another, even if he or she spends no time in that abode, will often be classified as a resident of both states and thus be subject to a tax on his or her earned and unearned income in both states. Yet neither state will grant a credit for the taxes he or she pays to the other state on unearned income or on income earned in a third state, because such income does not have its "source" in the other state. Consequently, the taxpayer who crosses state lines to pursue economic activity is subjected to the risk of, and, in many cases the actuality of, multiple taxation to which the taxpayer who confines his or her activity to a single state is not exposed.

State tax statutes that create a risk of multiple taxation have long been condemned by this Court as violative of the

Commerce Clause prohibition of burdensome and discriminatory taxation. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Nevertheless, the court below found that New York's statutory scheme which, like similar schemes in many other states, creates an indisputable risk of multiple taxation, passed muster under the Commerce Clause. It so concluded on the ground that the statutory scheme did not even affect interstate commerce and, therefore, was not subject to Commerce Clause scrutiny at all. The court further held that the risk of multiple taxation did not offend this Court's doctrine barring taxes that discriminate against interstate commerce.

As we demonstrate below, neither of these contentions can withstand analysis. This Court should therefore grant this petition in order to protect our national common market from a statutory scheme that burdens taxpayers across the country, merely because they cross state lines to engage in economic activity.

B. New York's Personal Income tax on Interstate Commerce Substantially Affects Interstate Commerce Within the Meaning of the Commerce Clause

1. The Commerce Clause Applies to Any Activity that Affects Interstate Commerce

A state's ability to tax interstate commerce is limited by the constraints of the Commerce Clause of the United States Constitution. This Court has made it clear that any tax that substantially *affects* interstate commerce – as a tax applied to one who crosses state lines to get to work and maintains a secondary residence in that state there surely does – must comply with this Court's substantive Commerce Clause

criteria.[5] Controlling principles of contemporary Commerce Clause jurisprudence make it clear that a tax on income of individuals living in one state and working and maintaining an apartment in another necessarily affects interstate commerce and, thus, the Tamagnis' claim is entitled to review under substantive Commerce Clause criteria.

This Court has consistently held that the determination of whether a tax is subject to Commerce Clause restrictions depends on the tax's practical effect on interstate commerce, not on the geographical scope of the particular taxpayer's activities. In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court considered the constitutionality of Montana's thirty percent severance tax on coal that allegedly discriminated against interstate commerce because virtually all of the coal severed in Montana was destined for out-of-state consumption. The state court had held that the tax was not subject to Commerce Clause scrutiny because severance was "an intrastate activity preceding the entry of the coal into interstate commerce." *Id.* at 613-14. This Court unequivocally rejected this anachronistic approach to Commerce Clause analysis and held that "the correct analysis focuses on whether the challenged tax substantially *affects* interstate commerce, in which case it must be scrutinized under the *Complete Auto* test." *Id.* at 614 (emphasis added).

In *Commonwealth Edison*, this Court noted that it had "long ... rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or

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[5] As a leading text on constitutional law declares:

> Completely Internal Commerce. What is "completely internal" has long been narrowly defined, for the commerce power extends to all matters that affect interstate commerce. Such is now the modern view."

John E. Nowak & Ronald D. Rotunda, *Constitutional Law*, § 8.2 at 283 n. 4 (5th ed. 1995).

'intrastate' activity." *Commonwealth Edison*, 453 U.S. at 615 (emphasis added). Rather, this Court's goal "[i]n reviewing Commerce Clause challenges to state taxes ... has instead been to 'establish a consistent and rational method of inquiry focusing on the practical effect of a challenged tax'" (*Id.* (citation omitted)) –namely, the *Complete Auto* test. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Consequently, even though taxes may be levied on local activities that may not be regarded as interstate commerce, such taxes "may substantially affect interstate commerce, and this effect is within the proper focus of Commerce Clause inquiry." *Id.* at 616 (emphasis added).

The broad extent to which the Commerce Clause applies to seemingly local *or* isolated activity is further demonstrated by this Court's decisions analyzing the federal government's authority under the Commerce Clause. The test as to whether a state statute is subject to Commerce Clause restrictions is the same as the test for whether Congress has the power to regulate activity under the Commerce Clause. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 39 (1980 ("the same interstate attributes that establish Congress' power to regulate commerce also support constitutional limitations on the powers of the States"); *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979) ("the definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation"). Thus, if Congress can regulate an activity under the Commerce Clause, a state tax involving such an activity is also subject to Commerce Clause restrictions. In analyzing the scope of Congress's power under the Commerce Clause, this Court has sustained as a legitimate exercise of Congressional power (1) the amount of wheat a farmer can grow for his own consumption, *Wickard v. Filburn*, 317 U.S. 111 (1942); (2) discriminatory practices in local hotels and restaurants, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) *Katzenbach v. McClung*, 379 U.S. 294 (1964); and (3) local criminal activity, *Perez v. United States*, 402 U.S. 146 (1971) If Congress has the power under the

Commerce Clause to regulate all of these seemingly local activities, then the Commerce Clause also must apply to limit the state taxation of individuals living in one state and participating in economic activities in another.

In sum, given the broad scope of what has been considered to "affect" commerce, there can be no serious argument that a tax which has a substantial adverse affect on those (like Mr. and Mrs. Tamagni) who cross state lines to pursue economic activity falls outside the purview of the Commerce Clause. The Court of Appeal's opinion to the contrary is wrong.

2. By Its Very Terms, the Statute at Issue Necessarily Affects Interstate Commerce

The applicability of the Commerce Clause to a tax on individuals domiciled outside of New York but who maintain a secondary residence in New York (whether or not they even use it) and perform other activities in New York is conclusively established by the plain language of the statute because the statute applies only to taxpayers who maintain places of abode in at least two taxing jurisdictions. A taxpayer, such as Mr. Tamagni, is inextricably involved in interstate commerce through (1) employment in New York, (2) the obvious commercial activities involved in maintaining a secondary place of abode in New York, and (3) the general elements of commerce that are necessarily implicated from spending time in New York, such as transportation, meals, and incidental purchases. *Because the imposition of the tax falls only on individuals carrying on economic activities in at least two different states, it must be subject to the Commerce Clause.*

Inasmuch as taxpayers subject to New York income tax under Tax Law § 605(b)(1)(B) by definition must (1) live in a state other than New York and (2) also participate in economic activities in New York, the statute specifically targets taxpayers involved in interstate economic activity.

Further, the very acts of statutory residents which subject them to the tax in question necessarily require the crossing of state lines in order to make economic choices. Crossing state lines to make economic choices is a standard formulation of activities which "substantially affect interstate commerce." *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurant buying food that crosses state lines and serving interstate travelers substantially affected interstate commerce). By *meeting the requirements to be classified as a statutory resident, a taxpayer automatically fulfills the requirements to be protected under the Commerce Clause.*

This Court has recently issued a decision that confirms the view that New York's income taxation on statutory residents affects the Commerce Clause. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. ___, 117 S. Ct. 1590 (1997), this Court held that a Maine property tax statute violated the Commerce Clause by denying a property tax exemption to a nonprofit summer camp because it did not operate principally for the benefit of Maine residents. In so holding, this Court shed considerable light on the principal issues presented in the case at bar.

In *Camps Newfound*, the taxing authority argued that the Commerce Clause was inapplicable to the taxpayer's claim because the case did not involve interstate commerce. *Id.* at 1596. In rejecting the taxing authority's argument and ruling that the nonprofit summer camp's claim did indeed raise an issue cognizable under the Commerce Clause, this Court reiterated a number of fundamental propositions that remove any doubt – if there ever was any – that the Commerce Clause is applicable to the Tamagnis' claim. *Id.* at 1597-98.

First, this Court noted that "[e]ven though petitioner's camp does not make a profit, it is unquestionably engaged in interstate commerce, not only as a purchaser, but also as a provider of goods and services." *Id.* at 1596. Similarly, the Tamagnis here are "unquestionably engaged in interstate commerce, not only as a purchaser [of goods and services in New York], but also as a provider of ... services." Indeed, as

noted below, the record is replete with evidence of the Tamagnis' expenditures in New York, such as business dinners and the purchase and maintenance of an apartment, as well as his services as an investment banker.

Second, this Court recognized that the fact that the out-of-state campers had to cross state lines constituted interstate commerce. *Id.* Accordingly, just as "[t]he attendance of these campers necessarily generates the transportation of persons across state lines that has long been recognized as a form of 'commerce,'" *Id.*, so the presence of Mr. Tamagni in New York State for parts of more than 184 days while he was domiciled in New Jersey necessarily generated the transportation of a person "across state lines that has long been recognized as a form of 'commerce.'"

Third, this Court reiterated that "[i]n determining whether the transportation of persons is 'commerce, ... [i]t is immaterial whether or not the transportation is commercial in character." *Id.* at 1602. Hence Mr. Tamagni's commute from New Jersey to New York, whether or not characterized as "commercial," clearly constitutes interstate commerce.

Fourth, this Court rejected the taxing authority's argument that the Commerce Clause was inapplicable because a real estate tax was at issue. *Id.* at 1597. "A tax on real estate, like *any other tax*, may impermissibly burden interstate commerce." *Id.* (emphasis added). Consequently, it is plain that the Commerce Clause applies to discriminatory personal income taxes (like the tax at issue here) just as it applies to "any other tax."

In short, like the taxpayer's claim in *Camps Newfound*, the Tamagnis' claim here substantially affects interstate commerce.

3. The Specific Facts in the Record Demonstrate that Interstate Commerce was Affected

Even if the statute on its face were not subject to Commerce Clause scrutiny, the facts in the record clearly prove that the Tamagnis' activities in this case were protected by the Commerce Clause. (The Court of Appeals decision to the contrary ignores the reality of the Tamagnis' lifestyle as set forth in the record.) The *only* reason that the Tamagnis were classified as statutory residents was because of their commercial activities involving movement of goods and services (Mr. Tamagni's services as an employee and their purchase of real estate, dinners, and other merchandise in New York) between New York and New Jersey. If the Tamagnis, and other taxpayers like them, are dissuaded from leaving their state of domicile to participate in the New York economy because of an increased tax burden not borne by New York domiciled taxpayers, the New York economy (and the nation's) will be significantly affected because of the change in competition, supply, and labor force; this altering of the national market is a classic example of the scenario the Commerce Clause sought to prevent. The record is replete with examples of the Tamagnis' participation in interstate commerce (which participation caused the imposition of the tax at issue).

First, the record clearly establishes that Mr. Tamagni's presence in New York was a result of his employment in the state (Pet. App. at E-2) and employment is an inherently commercial enterprise involving multistate economic competition and opportunities. It cannot be disputed that New York's ability to attract workers from other states significantly impacts the economy of the state and the nation. Further, the nature of Mr. Tamagni's job itself significantly affected interstate commerce. Mr. Tamagni designed financing plans for municipal entities in other jurisdictions and met with representatives from other jurisdictions, including New Jersey, to implement the plans. Pet. App. at E-2. A lack of competition between the states for this type of

work and the corresponding labor pool would clearly affect the municipal finance industry and many other aspects of the economy.

Second, the Tamagnis' purchase and maintenance of a New Jersey home and a New York apartment involved them in the interstate real estate market. Mr. and Mrs. Tamagni lived in Summit, New Jersey, (Pet. App. at E-1), and were not domiciled in New York. Pet. App. at E-1, E-2. However, the Tamagnis did maintain an apartment in New York. Pet. App. at E-2. It goes without saying that maintaining a permanent place of abode – which entails being a participant in the real estate market, purchasing utilities, and acquiring items of service for upkeep – necessarily implicates commercial activities.

Third, merely spending part of more than 183 days (as is required to be classified as a statutory resident) in a jurisdiction also involves participation in interstate commerce through practices such as purchasing sundries and transportation services, utilizing banking facilities, and frequenting restaurants and retail establishments. The Appellate Division seemed concerned that if it adopted this view, then all New York domiciliaries would also be covered by the Commerce Clause. The Appellate Division's concern is unwarranted because even if the tax on domiciliaries were subject to Commerce Clause scrutiny, it would still pass the necessary tests under that provision and would, therefore, be perfectly valid.

Interstate commerce is further affected by the Tamagnis' activities because of the relationship between Mr. Tamagni's job in New York, his home in New Jersey, and the decision to obtain the apartment in New York. Mr. Tamagni's job required frequent late work nights and business entertaining in the City[6] and the Tamagnis maintained the New York

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[6]The record below has numerous instances in which Mr. Tamagni entered New York as a result of his job and participated in New York commerce to further his company's business, including expense reports
(Footnote Continued on Following Page)

apartment as a place for Mr. Tamagni to stay after late business meetings. Pet. App. at E-2. The Tamagnis used the apartment primarily for business purposes and rarely used it for personal reasons. Pet. App. E-2. Thus, the acquisition and maintenance of the apartment affected both Mr. Tamagni's choice of a job and his ability to promote his company's interest in the municipal bond market.

This Court's holdings in both *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Goldfarb v. Virginia State Bar*, 421 U.S.773 (1975), markedly demonstrate that the Tamagnis' activities are covered by the Commerce Clause. The facts in *Goldfarb* are very similar to the instant case because, like the Appellants' case, the activities at issue in *Goldfarb* were the performing of a job (attorney executing a title search) and the acquisition of a place of abode. *Goldfarb*, 421 U.S. at 775. Inasmuch as this Court specifically held in *Goldfarb* that performing a local job and the acquisition of a house substantially affected interstate commerce, then equally so here must the performing of a job and the acquisition and maintenance of an apartment substantially affect interstate commerce.

Wickard v. Filburn is also particularly instructive because the activity subject to the Commerce Clause in that case was a farmer growing wheat on his own property for his own consumption. *Wickard*, 317 U.S. at 114. The farmer in *Wickard* did not cross state lines or sell the particular wheat in question; thus, the specific activity at issue was seemingly both noncommercial and purely local. *Id.* Nevertheless, this Court still found that "home-consumed wheat would have a substantial influence on price and market conditions," and, thus, was subject to the Commerce Clause. *Id.* at 128. The Tamagnis' much more extensive activities in interstate commerce clearly surpass those in *Wickard* and, thus, must likewise be covered under the Commerce Clause.

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detailing New York eating establishments at which Mr. Tamagni entertained business guests.

The record repeatedly and clearly reveals that the only reason the Tamagnis were classified as statutory residents of New York and were thus subject to multiple taxation was because of Mr. Tamagni's commercial activities taking him across state lines. Such interstate commercial activity is protected by the Commerce Clause.

4. If the State Court's Constricted Inter-pretation of the Commerce Clause Is Left Undisturbed, It Will Significantly Curtail the Proper Scope of Protection for Interstate Commerce.

The New York Court of Appeals' unduly restrictive view of the Commerce Clause has profound implications for the scope of the protections that this Court has historically afforded to interstate commercial activities. If the decision below is allowed to stand, it will immunize from Commerce Clause scrutiny a whole range of activities that, at least until now, have properly been shielded from taxes that discriminate against and otherwise burden interstate commerce. Thus, if the Tamagnis can be subjected to multiple taxation on the theory that no constitutionally cognizable economic activity is occasioned by Mr. Tamagni's crossing state lines to work and maintain an abode, then states will be equally free to subject other nondomiciliary workers to discriminatory taxes on the theory that crossing state lines in pursuit of their employment does not constitute interstate economic activity. Similarly, the holding of the court below would allow states to subject nondomiciliary real estate investors to multiple taxation on the theory that their ownership of real estate does not constitute "economic activity" in the state. In short, the pernicious implications of the decision below, particularly with regard to the diminished Commerce Clause protections it would accord to those who live in one state and work in another, provide a compelling justification for this Court's review.

C. New York's Internally Inconsistent Definition of Residence for Personal Income Tax Purposes Violates the Commerce Clause

New York's personal income tax violates the "internal consistency" test. Under that test, one "simply looks to the structure of the tax at issue to see whether its identical application by every state in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.* 514 U.S. 175, 185 (1995). If every state adopted New York's residency definition and credit provision (as many states have), taxpayers like Mr. Tamagni, who are domiciled in one state, but who maintain a residence in another state and spend any part of at least 184 days annually in that other state, would shoulder a greater tax burden than taxpayers who confine their activities to a single state.

More specifically, the Tamagnis were domiciled in New Jersey but were classified as statutory residents of New York during the years in issue because of Mr. Tamagni's employment in the City. Therefore, if both New Jersey and New York adopted New York's residency rules, the Tamagnis would be taxed on 100% of their income by both New Jersey and New York – the former on the basis of domicile and the latter on the basis of the 183-day rule. Tax Law § 605(b)(1). Consequently both New Jersey and New York would subject the Tamagnis to a tax on all of their income from whatever source derived (subject to the partial credit, *see supra*, discussion at pp. 3-6). Tax Law §§. 601, 611, and 612.

The New York personal income tax discriminates in favor of people making their domicile in the same state in which they work. A tax which by its operation imposes greater burdens on out-of-state activities than on instate activities is discriminatory under the Commerce Clause. In this case, the tax discriminates against the activities of individuals classified as statutory residents because New York workers living outside the state, like the Tamagnis, are subject to tax twice (once in their state of domicile and once in New York),

while local workers are subject to tax only once. As a consequence, it is more difficult (expensive) for non-domiciliary statutory residents, like the Tamagnis, than for New York domiciliaries to work in New York.

The multiple taxation resulting from New York's personal income tax is similar to the situation resulting from the tax which was ruled unconstitutional in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) In *Armco*, this Court determined that the tax scheme discriminated between transactions on the basis of interstate commerce because "the tax provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Id.* at 642. The New York personal income tax, which is based on statutory residency, has exactly the same discriminatory effect. Under the statutory residency statute, a taxpayer that has his or her domicile in one state and uses another state as his or her place of employment will be taxed by both the state of domicile and the state of employment, while a taxpayer who works and lives in the same state will be taxed only once. This is the same scenario as in *Armco*, in which this Court properly held that the statute in question was unconstitutional.

Although the credit that New York grants (and, according to the internal consistency test's hypothetical tax scheme, New Jersey would grant) for taxes paid to other states would offer some limited relief from the multiple taxation of a statutory resident's income,[7] the credit would have no application to income statutory residents derived from intangibles not employed in a business carried on in such other state. Tax Law § 620(a); 20 N.Y.C.R.R. §§ 120.1(a), 120.4(d). Consequently, statutory residents are subject to multiple taxation on all of their income earned from stocks,

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[7]Obviously, the Tamagnis could seek the credit in only one of the two states. *See* 20 N.Y.C.R.R. § 120.4(c) ("no credit is allowable if is no tax is actually due to the other jurisdiction").

bonds, and other intangibles not employed in a business. By contrast, an individual who confined all of his or her activities to a single state would be taxed only once on his or her intangible income.

It is important to note that the problem of multiple taxation is not limited to income from intangibles. When a statutory resident earns income from sources in a third state (i.e., neither New York nor the state of domicile) that did not tax – income e.g. compensation for personal services performed in Florida or rents from real property owned in Texas – then New Jersey and New York would both tax that income, while not providing a credit to the taxpayer for taxes paid to the other state for taxes paid on such income (because the income would not have been "derived" from such other state). As a result of this potential for multiple taxation, New York's taxing scheme violates the "internal consistency" principle by subjecting the statutory resident, who earned income in more than one state, to a greater tax burden than that borne by an otherwise identical taxpayer who confined his or her activities to a single jurisdiction.

The question in this case is whether the statutory residency statute imposed an impermissible burden on the Tamagnis' decision to work and maintain a secondary residence in a state other than the one in which they were domiciled. Clearly the Tamagnis incurred tax burdens as a result of their activity involving the crossing of state lines that they would not have incurred if they had worked, maintained a secondary residence, and lived in the same state. As noted above, the record in this matter unambiguously demonstrates that the Tamagnis' primary reason for maintaining an apartment in New York City was to facilitate Mr. Tamagni's business responsibilities. Pet. App. at E-2. If Mr. Tamagni had not had a job in New York City that required his frequent presence late into the evening, the Tamagnis would not have incurred the New York personal income tax on all of their income. This burden of multiple taxation, while not preventing either Mr. Tamagni's employment across state lines or the Tamagnis' maintaining a

residence across state lines, creates an economic disincentive to cross state lines for employment and secondary residence maintenance and thus violates the Commerce Clause.

CONCLUSION

The court below has allowed to stand a statutory taxing scheme that significantly burdens interstate commerce. By subjecting interstate participants in the New York economic marketplace to a higher level of taxation than purely intrastate participants, the State of New York imposes a discriminatory taxing system that is in violation of the Commerce Clause. Under the "internal consistency" requirement of the Commerce Clause, the potential for multiple taxation inherent in the challenged statute and other statutes similarly drafted is present and significant, justifying review by this Court. Accordingly, the Court should grant the writ.

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APPENDIX A

COURT OF APPEALS OF NEW YORK

In the Matter of

John S. Tamagni et al.,

Appellants,

v.

TaxAppeals Tribunal of the State of New York et al.,

Respondents.

No. 45

May 14, 1998,

Decided

Petitioners, John and Janet Tamagni, contend that the New York State resident income tax (Tax Law Article 22) violates the dormant Commerce Clause (U.S. Constitution, Article I, §8) as applied to statutory residents of this State who claim another State as their domicile. Petitioners argue that, because New York gives no credit for resident income taxes paid to other States on investment income from intangible personal property, such as interest and stock dividends (so-called "intangible income"),[1] it potentially subjects them to double taxation in violation of the Supreme Court's "internal consistency" test (see, *Container Corp of America v Franchise Tax Board*, 463 U.S. 159, 77 L. Ed. 2d 545, 103 S. Ct. 2933). In our view, the statute does not substantially affect interstate commerce and, therefore, the protections of the dormant Commerce Clause are not

[1] "Income from intangible personal property" is defined by Tax Department regulations as "items of income, gain, loss and deduction attributable to intangible personal property * * * including annuities, dividends, interest, and gains and losses from the disposition of intangible personal property" 11 (20 NYCRR 132.5[al).

applicable. Even assuming arguendo that the Commerce Clause is implicated, the tax does not violate the dormant Commerce Clause because the tax does not facially discriminate against interstate commerce, and States have traditionally retained broad powers to tax their own residents.

I.

The Tamagnis are New Jersey domiciliaries, having resided at their current address in Summit, New Jersey from 1979 through and including the tax years at issue – 1987, 1988 and 1989. Mr. Tamagni is an investment banker with the firm of Lazard Freres. His office is in New York City; however, his work often requires him to travel throughout the country. The Tamagnis own and maintain an apartment in New York City, in addition to homes in New Jersey and New Hampshire. For each of the years at issue, petitioners filed non-resident income tax returns in New York. After a field audit, the New York State Department of Taxation and Finance concluded that the Tamagnis were statutory residents of New York because (1) Mr. Tamagni had not demonstrated that he spent fewer than 184 days in New York City and New York State, and (2) the couple maintained a permanent place of abode in New York (Tax Law §605[b][B]).[2] As a result, all of their income was subject to the State income tax.[3] The Department issued a Notice of Deficiency indicating that the

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[2] Tax Law §605(b)(B) provides that a "resident individual" includes one "who is not domiciled in this State but maintains a permanent place of abode in this State and spends in the aggregate more than one hundred eighty-three days of the taxable year in this State * * *." New York City imposes a similar tax on City residents (see, NYC Administrative Code §11-1705[b]). Because the City Code provision precisely mirrors Tax Law §605(b)(B), for simplicity sake this opinion will refer only to the Tax Law provisions.

[3] The Tamagnis had New York State taxable income of $1,740,897 for 1987, $2,127,838.20 for 1988 and $1,807,928.50 for 1989.

Tamagnis owed an additional $192,541.22 in State and City income taxes, plus penalties and interest.

The Tamagnis petitioned the Department for a redetermination of the deficiency, asserting that they were not New York residents for any of the periods at issue. After a hearing, an Administrative Law Judge concluded that petitioners had not established that they had spent fewer than 184 days in New York State for tax years 1988 and 1989, and in New York City for 1988.[4] Thus, the ALJ concluded that the Tamagnis were properly assessed as statutory residents for those periods only. The Tamagnis also challenged the constitutionality of the tax as applied to them. The ALJ viewed this as a facial challenge to the constitutionality of Tax Law §620(a) and concluded that he was without administrative jurisdiction to entertain such a facial challenge.

On appeal to the Tax Appeals Tribunal, the Tamagnis again argued that, as applied to them, the New York State definition of residence for income tax purposes discriminates against interstate commerce in violation of the dormant Commerce Clause, in that it subjects them to potential multiple taxation of intangible income. The Tribunal addressed this argument on the merits and rejected it. The Tribunal concluded that the taxpayers had not shown how they were engaged in interstate commerce simply by being domiciled in New Jersey while also being statutory residents of New York. Thus, the Tribunal concluded that the Commerce Clause was not applicable.

The Tamagnis then commenced a CPLR Article 78 proceeding challenging the Tribunal's determination, arguing that the residency tax violates the dormant Commerce Clause

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[4] Because Mr. Tamagni spent a number of days in 1989 in parts of New York State outside New York City he qualified as a State resident for that year but the time he spent in New York City fell below the 184 day residency threshold.

both facially and as applied to them.[5] After partially converting the proceeding to a declaratory judgment action, the Appellate Division affirmed, concluding that the Commerce Clause was not implicated by the imposition of the tax, because neither commuting from New Jersey to New York to work, nor maintaining a permanent residence in New York, produced "the requisite effect on commerce" (Tamagni v. Tax Appeals Tribunal of New York, 230 A.D.2d 417, 420, 659 N.Y.S.2d 515). We granted petitioners leave to appeal, and now affirm.

II.

Under Tax Law §605(b)(B), any person who maintains a permanent place of abode in this State, and spends in excess of 183 days here, is deemed a resident for State income tax purposes.[6] This classification is significant because, while non-residents are taxed only upon their New York source income (Tax Law §631), residents are taxed upon their worldwide income (Tax Law §612).

Defining residency for income tax purposes is not a new problem. The current statute can be traced back to Chapter 425 of the Laws of 1922, which first defined residence for tax purposes in terms of maintenance of a permanent place of abode in New York and presence in this State for seven months (see, former Tax Law §350[7]). At the time the statute was enacted the Income Tax Bureau noted in its memorandum in support of the legislation that, "we have several cases of multimillionaires who actually maintain homes in New York and spend ten months of every year in

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[5] The Tamagnis also raised a State constitutional claim that is not pursued before this Court.

[6] Under Tax Department regulations, when a person is present "within New York State for any part of a calendar day," that day counts toward the 184-day residency threshold (20 NYCRR 102.2[c]). The validity of this regulation is not challenged here.

those homes * * * but they * * * claim to be nonresidents" (Bill Jacket, L 1922, ch 425). The statutory residence provision serves the important function of taxing those "who, while really and [for] all intents and purposes [are] residents of the state, have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents" (id). In short, the statute is intended to discourage tax evasion by New York residents. Indeed, the Tax Department's memorandum in support of the 1954 amendment to the statute, which established the "in excess of 183 days" requirement, specifically states that the amendment was necessary to deal with "many cases of avoidance and evasion" of income tax by New York residents (see, Memorandum of Dept. of Tax. and Fin., Bill Jacket, L 1954, ch 99).

The vast majority of States join New York in utilizing definitions of residency for income tax purposes that include another category of taxpayers in addition to domiciliaries.[7] In fact, by requiring both a permanent place of abode in this State, and presence for more than half of the year, New York's definition of "resident" is far less expansive than some. For example, Iowa, Louisiana and Maryland define residents to include people who maintain a permanent place of abode within the State, regardless of the amount of time actually spent within the State (see, Iowa Code §422.4[15]; La Rev Stat 47:31[l]; MD Code Ann., Tax-General, §10-101[h]).

While residents are generally subject to income tax based upon their worldwide income, New York does provide a tax credit for income taxes paid by its residents to other States. In order to qualify for this credit, the tax imposed by the other

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[7] By one commentator's count, "only Massachusetts, New Mexico, South Carolina, and Wisconsin limit their definition of resident to include domiciliaries alone" (Note, "Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, 91 Column L Rev 119, 122, n 19).

State must be on income "derived therefrom" – i.e., earned in the other State (Tax Law §620[a]). As the accompanying regulations recognize, this provision protects residents actually engaged in interstate commerce from double taxation by ensuring that they are taxed only once upon income derived from interstate activities (see, 20 NYCRR 120.1[a][2]; 20 NYCRR 120.4[d] ["the resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction"]).

The credit is not generally available for intangible income because that income has no identifiable situs. Intangible income generally is not derived, at least directly, from the taxpayer's efforts in any jurisdiction outside of New York, and cannot be traced to any jurisdiction outside New York. It is simply investment income, and under the long recognized doctrine of mobilia sequuntur personam (["movables follow the * * * person"] Black's Law Dictionary 905 [5th ed 1979]), it is subject to taxation by New York as the State of residence (see, *Maguire v Trefry*, 253 U.S. 12, 16, 64 L. Ed. 739, 40 S. Ct. 417). However, where the taxpayer can show that intangible income is in fact derived from the taxpayer's activities in a State other than New York, the taxpayer is entitled to the credit (20 NYCRR 120.4[d] [credit allowed where the income is "derived from property employed in a business, trade or profession carried on in" another State]).

The Tamagnis do not challenge their status as New York residents nor do they claim that the Tax Law §605(b)(B) definition of resident violates the Due Process Clause. They challenge the statute only on the ground that it subjects them to potential double taxation of their intangible income, because New York does not grant a credit for taxes on such income paid to other States.

The taxpayers assert that the Appellate Division applied an overly restrictive definition of interstate commerce in concluding that the protections afforded by the dormant Commerce Clause do not apply here. As they correctly note, "the definition of 'commerce' is the same when relied on to strike down or restrict state legislation [under the dormant Commerce Clause] as when relied on to support some exertion of federal control or regulation" (*Camps Newfound/Owatonna, Inc. v Town of Harrison*, ___ U.S. ___, 117 S. Ct. 1590, quoting *Hughes v Oklahoma*, 441 U.S. 322, 326, n 2, 60 L. Ed. 2d 250, 99 S. Ct. 1727). Thus, if the tax at issue "substantially affects" interstate commerce (*see*, *United States v Lopez*, 514 U.S. 549, 559, 131 L. Ed. 2d 626, 115 S. Ct. 1624) such that Congressional legislation limiting the State taxing power would be a valid exercise of its Commerce Clause powers, then the Commerce Clause is implicated.

Prior to *Lopez* (supra), the Supreme Court's post New Deal Commerce Clause jurisprudence had expanded, almost without limit, the scope of activities deemed to affect interstate commerce. In *Wickard v Filburn* (317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82), for example, the Court upheld the application of the Agricultural Adjustment Act of 1938 to a farmer growing wheat for his own personal consumption. While *Wickard* may represent "the most far reaching example of Commerce Clause authority over intrastate activity" (*United States v Lopez*, supra, 514 U.S. at 559), the Supreme Court has shown little inclination to limit Congress' powers as delineated by the Commerce Clause. Indeed, since *NLRB v Jones & Laughlin Steel Corp.* (301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615), the Court has upheld virtually all Federal enactments against challenges that they exceeded Congressional authority under the Commerce Clause. Of two notable exceptions in which the Court struck down Congressional legislation as exceeding its Commerce Clause authority (*see*, *United States v Lopez*, supra; *National League of Cities v Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465), one, *Usery*, was overruled nine years later (*see*,

Garcia v San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005). Nevertheless, as difficult as it may be to discern the outer boundary of Congressional power under the Commerce Clause, the Supreme Court has from time to time reiterated that such a boundary does exist. In *Maryland v Wirtz* (392 U.S. 183, 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017, overruled on other grounds, *National League of Cities v Usery*, supra, overruled by *Garcia v San Antonio Metropolitan Transit Authority*, supra) the Court stated that "the power to regulate commerce, though broad indeed, has limits" and that Courts have "ample power" to enforce those limits. The Court went on to point out that nowhere "has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities" (*id.*, at 197, n 27). More recently, in *United States v Lopez* (supra), the Court struck down the federal Gun-Free School Zones Act (18 USC §922[q][1][A]) as exceeding Congressional Commerce Clause authority. In doing so, the Court emphasized that Congressional authority to enact legislation regulating intrastate activities which "substantially affect" commerce is limited to economic activities (*United States v Lopez*, supra, 514 U.S. at 556).

Significantly, the Lopez Court also pointed to the lack of legislative findings to support the Congressional assertion of interstate commerce power (*United States v Lopez*, supra, 514 U.S. at 562-563). Similarly, in this case, the Tamagnis have not shown any demonstrable impact on an identifiable interstate market which would warrant the conclusion that this tax substantially affects interstate commerce.

The New York income tax is based upon a taxpayer's resident status, without regard to any specific commercial or economic transaction or activity. While the dissent points to the fact that Mr. Tamagni is engaged in interstate commerce in that he commutes daily from New Jersey, works as an investment banker in New York, and is involved in numerous economic activities while in New York, the income tax is imposed without regard to his commute, or the specific

nature of his activities in this State. It is imposed solely based upon his presence and maintenance of a permanent place of abode in New York, without regard to any economic activities incidental to his presence here. Indeed, the fact that commuters who do not own or lease property in New York are not subject to this tax demonstrates that the tax is completely indifferent to the interstate activities which the Tamagnis claim, in conclusary fashion, are affected. Thus, in our view, the interstate Commerce Clause is not implicated by the New York income tax.

Despite our conclusion that the Commerce Clause has no application to the statute at issue, we will proceed under the assumption that Congressional legislation limiting the State's ability to tax non-domiciliary residents would be upheld given the expansive scope of the Supreme Court's Commerce Clause jurisprudence (see, Moore, State and Local Taxation: When Will Congress Intervene, 23 J. Legis. 171; Note, "Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, 91 Column L Rev 119).

Even if Congressional power is assumed, this is far from determinative. Indeed, while it does dictate some level of dormant commerce clause scrutiny, it does not dictate the degree or method of that scrutiny. While the definition of commerce is the same whether the question is Congressional authority or limitation of a State's ability to legislate under the Commerce Clause, the validity of State legislation in the absence of Congressional action is ultimately an entirely different question than what subjects are within the reach of Congressional power (see, *United States v Lopez*, supra, 514 U.S. at 568-569 [Kennedy, J. concurring]). It is to this question – the validity of the State statute in the absence of Congressional action – that we now turn.

III.

The Commerce Clause provides that "the Congress shall have Power * * * to regulate Commerce * * * among the

several States" (US Const, Article I, §8, cl. 3). On its face, the Clause is simply an affirmative grant of power to Congress, imposing no free-standing limitation on State power. Nonetheless, the Clause has long been read to contain, in addition to the affirmative grant of Federal power, a limitation upon State legislation as well. However, as previously noted, the two are not coextensive. That Congress has the power to regulate whatever may "substantially affect" interstate commerce does not mean that the States are without power to regulate in a manner which affects interstate commerce. Rather, in keeping with the original intent of the Commerce Clause to prevent the type of "economic Balkanization" which characterized the early Confederation (*Hughes v Oklahoma*, supra, 441 U-S. at 325) the negative, or dormant, Clause invalidates only State measures which "unjustifiably * * * discriminate against or burden the interstate flow of articles of commerce" (*Oregon Waste Systems v Dept of Environ. Quality*, 511 U.S. 93, 98, 128 L. Ed. 2d 13, 114 S. Ct. 1345).

Thus, "the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce' * * * . As we use the term here, 'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (*id.*, quoting *Hughes v Oklahoma*, supra, 441 U.S. at 336). If there is no differential treatment of identifiable, similarly situated in-State and out-of-State interests, there is no dormant Commerce Clause violation.

There is little guidance in Supreme Court opinions as to how to resolve this threshold inquiry. As the Supreme Court recently noted in *General Motors Corp. v Tracy* (519 U.S. 278, ___, 117 S. Ct. 811, 824, 136 L. Ed. 2d 761), this initial inquiry "has more often than not itself remained dormant in this Court's opinions on state discrimination subject to review under the dormant Commerce Clause." One principle

that must be kept in mind, however, is that "the dormant Commerce Clause protects markets and participants in markets, not taxpayers as such" (id) .

Thus, contrary to the dissent's contention, the first step in the dormant Commerce Clause inquiry is not simply to apply the so-called Complete Auto test (*Complete Auto Transit, Inc. v Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076), including its "internal consistency" requirement (*Container Corp. of America v Franchise Tax Board*, supra).[8] Rather, the first step is to identify the interstate market that is being subjected to discriminatory or unduly burdensome taxation.[9] This requires, at the outset, identification of the similarly situated in-State and out-of State interests which the tax treats differently. In "the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply" (*General Motors Corp. v Tracy*, supra, 519 U.S. at ___, 117 S. Ct. at 825). Because the

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[8] A tax passes the Complete Auto test if it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." The Supreme Court has sometimes applied the internal consistency test in determining whether the tax is fairly apportioned and discriminates against interstate commerce. A tax fails the internal consistency test if, were the same tax imposed by another state, multiple taxation would result (*Container Corp. of America v Franchise Tax Board*, supra).

[9] It is unclear whether the claim here is that the tax discriminates against or unduly burdens interstate commerce. The dissent contends that the issue is whether the tax is unduly burdensome, regardless of its discriminatory impact. The Tamagnis, however, appear to argue that the tax "discriminates against" interstate commerce (see, Petitioner's Reply Brief, p. 2). As the Supreme Court noted in *General Motors Corp. v Tracy* (supra, 519 U.S. at ___, 117 S. Ct. at 824, n 12) there is "no clear line between these two strands of analysis" and for present purposes, at least, the distinction is unimportant.

tax at issue does not operate to the disadvantage of any identifiable interstate market, but rather simply taxes residents based on their status as residents, it does not violate the dormant Commerce Clause. The fact that it may have "incidental effects" on interstate commerce is not sufficient to prove a violation of the dormant Commerce Clause (*Oregon Waste Systems v Dept of Environ. Quality*, supra, 511 U.S. at 98; see also, *Fulton Corp. v Faulkner*, 516 U.S. 325, 331, 133 L. Ed. 2d 796, 116 S. Ct. 848).

The Tamagnis claim that the tax is discriminatory because it subjects statutory residents to potential double taxation which New York domiciliaries residing solely in New York do not face. However, statutory residents domiciled in another State are not similarly situated to New York domiciliaries. The former enjoy the privileges and protections of another State, and may therefore be subject to taxation by that State, which the latter do not. Moreover, regardless of the effects of the tax vis-a-vis different classes of taxpayers, the Tamagnis can identify no interstate market which is significantly impacted by the allegedly discriminatory tax.

The Tamagnis also claim that interstate commerce is affected here because Mr. Tamagni commutes to work in New York, thus implicating the interstate labor market, and because the tax is imposed based in part upon the purchase or lease of New York property by an out-of-state resident. However, the potential double taxation of which the Tamagnis complain bears no relation to either activity. The tax is not assessed against the interstate labor market per se; indeed, it is based solely upon the taxpayer's presence in New York. The potential effects of the tax on the interstate labor market (no actual effects have been demonstrated) are incidental at best.

The fact that non-domiciliaries who commute to New York and own or lease property here are potentially subject to the resident income tax, while non-domiciliaries who do not own or lease property in New York are not, does not

support any claim of discrimination or undue burden upon interstate commerce since the basis for the imposition of the tax as it relates to these classes of taxpayers (i.e., maintenance of a permanent place of abode in New York) "does not give rise to conflicting regulation of any [interstate] transaction or result in malapportionment of any tax" on an interstate activity (*General Motors Corp. v Tracy*, supra, 519 U.S. at ___, 117 S. Ct. at 824, n 12). The purpose of the apportionment requirement is to assure that interstate activities are not improperly burdened by multiple taxation (id). The possible effect, if any (and again no actual effect has been shown) on the New York real estate market represents a quintessentially local, rather than interstate, concern. Thus, because the potential double taxation does not fall on any identifiable interstate market, it does not favor intrastate commerce over interstate commerce in a manner violative of the dormant Commerce Clause.

The lack of any discrimination against an interstate market here may perhaps best be shown by comparison to an example of an intangible income tax which was held to be discriminatory. In *Fulton Corp. v Faulkner* (supra), the Court considered the validity of a North Carolina personal income tax on intangibles. The tax was assessed against the intangible income received by individuals at a rate inversely proportional to the underlying corporation's liability for North Carolina franchise taxes. This had the effect of taxing dividends from in-State corporations less than dividends from out-of-State corporations.[10] The effect on an interstate

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[10] The North Carolina franchise (or corporate income) tax is typical of that imposed by many States. It imposes a tax upon a corporation's income earned within the State. Because of the difficulties of apportioning the income of an integrated interstate and international corporation, States typically utilize a unitary business apportionment formula which "calculates the local tax base by first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that 'unitary business' between the taxing jurisdiction and the rest of *(Footnote Continued on Following Page)*

market in such a case is obvious, and is more than incidental. In this case, by contrast, there is no similar differential treatment of intrastate and interstate commercial interests. Indeed, this tax on its face does not apply to any interstate market whatsoever; it is a tax on residents based on their status as residents. There is simply no similarly situated out-of-state interest to compare to an in-state resident for purposes of applying a dormant Commerce Clause analysis. The Tamagnis were taxed for being New York residents and not for their interstate activities.

Even if the Complete Auto test were implicated here, as the dissent contends, it would not alter our conclusion that the tax at issue is constitutional. Petitioners argue, and the dissent agrees, that the tax violates the Complete Auto test because it is not "internally consistent" (dissenting opn, at 5 [citing *Goldberg v Sweet*, 488 U.S. 252 at 261, 102 L. Ed. 2d 607, 109 S. Ct. 582]). The internal consistency test is not a freestanding constitutional requirement, but is merely a tool for assessing the fair apportionment and non-discrimination prongs of the Complete Auto test. It comes into play when the same interstate activity crosses state lines and is subject to tax in more than one state (*see*, *Goldberg v Sweet*, 102 L. Ed. 2d at 616).

The fair apportionment requirement of *Complete Auto*, however, is not violated when the incidences of the tax fall on a separable local occurrence as opposed to an interstate activity, even where the local occurrence is part of a greater continuum that makes up an interstate transaction (*see*, *Oklahoma Tax Commn. v Jefferson Lines, Inc.*, 514 U.S. 175, 187-188, 131 L. Ed. 2d 261, 115 S. Ct. 1331 ["the Commerce

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the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction" (*Container Corp. of America v Franchise Tax Board*, supra, 463 U.S. at 165).

Clause does not forbid the actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along"]). In *Oklahoma Tax Commn. v Jefferson Lines, Inc.*, the Supreme Court held that the full price of an interstate bus ticket may be taxed in the state where travel originates, despite the fact that the service provided, and taxed, extends into other states (*see*, *id.*, at 187-192; see also, *Colonial Pipeline v Traigle*, 421 U.S. 100, 44 L. Ed. 2d 1, 95 S. Ct. 1538 [corporation franchise tax fairly apportioned as it taxes the incidence of actually doing business as a corporate entity in Louisiana]; *Western Line Stock v Bureau of Revenue*, 303 U.S. 250, 258, 58 S. Ct. 546, 82 L. Ed. 823 [business of printing and preparing a magazine distinct from circulation]). Here, the tax does not fall on any interstate activity, but rather on a purely local occurrence – the taxpayer's status as a resident of New York State.

"The question is whether the State has exerted its power in proper proportion to [the challenger's] activities within the State and to [its] consequent enjoyment of the opportunities and protections which the State has afforded" (*General Motors Corp. v Washington*, 377 U.S. 436, 440-441, 12 L. Ed. 2d 430, 84 S. Ct. 1564). New York has determined that the taxpayers who spend an inordinate amount of time and maintain a permanent abode here should be taxed accordingly. There is no need to apportion the tax because the incidences of the tax – the time petitioner spends in New York and the maintenance of a permanent abode in this state: both occur entirely within New York.

State universal income taxation of residents is justified by the protections and services which the State affords its residents and which residents, through contacts with the State sufficient to classify them as residents, are privileged to enjoy (*see*, *New York ex rel Cohn v Graves*, 300 U.S. 308, 81 L. Ed. 666, 57 S. Ct. 466). Thus, any claim of facial discrimination is belied by the very nature of the tax; since only New York may tax the income of its residents on the basis of their status as New York residents, there is no danger of another jurisdiction imposing a tax on the Tamagnis as

New York residents (*see*, *Oklahoma Tax Commn. v Jefferson Lines*, supra, 514 U.S. at 186-187).

Moreover, while universal income taxation is justified by the protections and services provided by the State of residency, neither due process nor the Commerce Clause requires that the tax bear an exact relation to the services actually provided to the individual taxpayer. If the law were otherwise, all similar taxes would be unconstitutional as currently imposed, since they inherently impose a larger burden upon those with higher incomes, without regard to the level of services utilized. It has long been recognized that "[a] tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits" (*New York ex rel Cohn v Graves*, supra, 300 U.S. at 312). Thus, the Tamagnis' claim that they should not be subject to tax on all of their income in this State because they also spend substantial amounts of time in another State and are subject to taxation there is without merit. The New York income tax operates to tax residents as residents of this State, without regard to their activities in other States; so long as the State's definition of resident does not violate due process (and there is no claim here that it does), no violation of the dormant Commerce Clause is apparent.

IV.

The inapplicability of dormant Commerce Clause analysis to State resident income taxation is further supported by both historical precedent and the fundamental State sovereignty interest at stake. The Supreme Court has long held that multiple taxation of State residents is not forbidden (see, *State Tax Commission v Aldrich*, 316 U.S. 174, 86 L. Ed. 1358, 62 S. Ct. 1008; *New York ex rel. Cohn v Graves*, supra; *Fidelity & Columbia Trust Co. v City of Louisville*, 245 U.S. 54, 62 L. Ed. 145, 38 S. Ct. 40). While this line of cases involved due process challenges, the very fact that the

dormant Commerce Clause was never mentioned as a limitation on State power to tax resident income suggests that there is no such limitation. Indeed, in *Goldberg v Sweet* (488 U.S. 252, 266, 102 L. Ed. 2d 607, 109 S. Ct. 582) the Supreme Court stated that "it is not a purpose of the Commerce Clause to protect state residents from their own state taxes."

Furthermore, we can conceive of no power more fundamental to the operation of a sovereign State than the power to tax its own residents. In *National League of Cities v Usery* (supra) the Supreme Court recognized the importance of certain fundamental attributes of State sovereignty, and held that such interests may check even the power of Congress to assert its Commerce Clause power. While *Garcia v San Antonio Metropolitan Transit Authority* (supra) overruled Usery insofar as the affirmative Commerce Clause power of Congress is concerned, it seems to us entirely appropriate to give the principles of federalism enunciated in Usery weight in assessing the scope of limitations on State taxing power in the absence of Congressional action. Congress itself has recognized that "the right of States to raise revenues in a manner of their own choosing [is] an essential element of a strong and vibrant Federal system" (Limitation on State Taxation of Certain Pension Income, House Report 103-776).

Indeed, Congress apparently has a self-imposed higher threshold for exercising its Commerce Clause authority to limit "the right of States to tax economic activities within their borders" (To Clarify State Authority to Tax Compensation Paid to Certain Employees, House Report 105-203). Recently enacted legislation provides evidence of the deference Congress has chosen to give States in taxing residents. By Public Law 104-95 Congress eliminated the ability of States to tax the pension income of non-resident retirees. The legislation provides that "no State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State)" (4 USC 114[al [emphasis

added]). Thus, in enacting this very limited restriction on State taxing authority, Congress explicitly deferred to State definitions of residency. This evidences a clear current Congressional intent to insulate State taxation of residents from federal scrutiny.

Thus, inasmuch as the ability of a State to tax its own residents is undoubtedly a "traditional aspect[ ] of state sovereignty" (*National League of Cities v Usery*, supra, 426 U.S. at 848) historical precedent and fundamental principles of federalism provide further support for our conclusion that the New York resident income tax is not unconstitutional, either on its face, or as applied to these taxpayers.

Accordingly, the judgment of the Appellate Division should be affirmed, with costs.

Judgment affirmed, with costs. Opinion by Judge Wesley. Chief Judge Kaye and Judges Bellacosa, Smith, Levine and Ciparick concur. Judge Titone dissents and votes to reverse in an opinion.

May 14, 1998, Decided

TITIONE, J. (dissenting):

I disagree with the majority that New York's tax on the intangible assets of the Tamagnis does not substantially affect interstate commerce. The majority argues that New York is not taxing interstate commerce because, in taxing income from intangibles, it is not taxing anything that moves across state lines in trade or commerce. Therefore, in the majority's view, the tax is "completely indifferent to the interstate activities" in which the Tamagnis engage. The majority is wrong because the question is not whether interstate commerce is taxed, but whether, as the United States Supreme Court has consistently held, interstate commerce is substantially affected by the tax (*Camps Newfound/Owatonna v Town of Harrison*, ___, U.S. ___, 117

S. Ct. 1590; *Tyler Pipe Indus. Inc. v Washington State Dept. of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199; *Fulton v Faulkner*, 516 U.S. 325, 133 L. Ed. 2d 796, 116 S. Ct. 848; *Armco, Inc. v Hardesty*, 467 U.S. 638, 81 L. Ed. 2d 540, 104 S. Ct. 2620).

Purely in-state taxes can still substantially affect interstate commerce, and the case law is replete with examples. The fact that taxes are levied on New York statutory residents does not make this a purely New York affair. In *Fulton Corp. v Faulkner*, the court struck down an intangibles tax on North Carolina state residents because the tax had the effect of discriminating against out-of-state corporations by taxing their dividends more if they remained outside of the state (516 U.S. 325, 116 S. Ct. 848, 133 L. Ed. 2d 796). In *Camps Newfound/Owatonna v Town of Harrison*, the court struck down a state tax on summer camps (and other charitable organizations) that imposed a lower tax rate on those serving in-state residents, as opposed to those who served out-of-state residents (___ U.S. ___, 117 S. Ct. 1590). The fact that the camp was enjoyed in Maine, and that the tax was on a Maine business, did not change the fact that the tax on a Maine summer camp, 95% of whose campers came from out-of-state, was substantially affecting interstate commerce. (*id.*; *see*, *Commonwealth Edison Co. v Montana*, 453 U.S. 609, 69 L. Ed. 2d 884, 101 S. Ct. 2946 [tax on coal only mined in state still subject to dormant Commerce Clause protections]). Although the town imposing the tax on the Maine summer camp tried to argue that the tax was like a real estate tax, the court firmly rejected the idea. It held that "to allow a state to avoid the structures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the constitution provides" (___, U.S. ___, ___, 117 S. Ct. 1590, 1997 U.S. LEXIS 322, *20).

Here, New York, under the majority's reasoning, is attempting to do the same thing. The majority labels the tax, a tax on intangibles or a tax on New York residents, but these

labels are not enough to eliminate the effect that this tax has on interstate commerce. The tax at issue is imposed by New York on those domiciled in other states, who, like the Tamagnis, come to New York and remain for a portion of at least 184 days and who maintain a "permanent place of abode" in New York (Tax Law §§605(b)(1); 612; 620(a)). Although the "permanent place of abode" required under the Tax Law §605(b)(1) is in New York, this statute, which is aimed at nondomiciliaries, also clearly contemplates that the person maintaining the abode comes from another state. Here, for example, petitioner, though not domiciled in New York, works here, and, as a result, he must travel into New York on a regular basis. He maintains a residence here and bought an apartment here to facilitate his ability to engage in his interstate economic and commercial activity.

The movement of people across state borders for economic purposes has previously been held to implicate interstate commerce (*see, Camps Newfound/Owatonna*, 137 L. Ed. 2d 852, 117 S. Ct. 1590; *Edwards v California*, 314 U.S. 160, 172, 86 L. Ed. 119, 62 S. Ct. 164; *see also, W.C.M. Window Co. v Bernardi*, 730 F.2d 486, 494 [7th cir.] [restriction of "flow into Illinois of labor services" is similar under a Commerce Clause analysis to the "flow of coal"]; *Chamber of Commerce of the United States v New Jersey*, 89 N.J. 131, 445 A.2d 353, 368 [NJ] [entry into state of those who would seek to break a labor strike constituted commerce]). As to the purchase of property, the Supreme Court in *Camps Newfound/Owatonna*, assumed, without deciding, that the Congress could impose a national real estate tax, and, as a result, even the purchase of property can exhibit substantial effects on interstate commerce (*Camps Newfound/Owatonna v Town of Harrison*, 137 L. Ed. 2d 852, 117 S. Ct. 1590 [activities that trigger protections of dormant Commerce Clause are those which can be reached by Congressional regulation under Commerce power]).

The fact that Congress has recently enacted a law regarding limitations on a state's ability to tax nonresidents does not support the majority's argument (see, 4 USC 114[a],

Public Law 104-95). It undercuts it. If Congress's Commerce Power can reach a state's right to tax its residents, it naturally follows that taxation of residents is an activity that substantially affects interstate commerce.

Once a state tax is determined to substantially affect interstate commerce, the question then becomes whether the tax unduly burdens interstate commerce. A state tax will do so, among other things, if it imposes a risk of multiple taxation. That risk is clearly prohibited by *Complete Auto Transit., Inc. v Brady*, (430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076) and its progeny. Under *Complete Auto Transit., Inc. v Brady*, the state tax will pass muster under the dormant Commerce Clause only if it satisfies a four-fold inquiry. New York's tax (1) must apply to an activity with a substantial nexus with the taxing state, (2) must be fairly apportioned, (3) cannot discriminate against interstate commerce, and (4) must fairly relate to the services provided by the State (*Complete Auto Transit, Inc. v Brady*, 430 U.S. at 279).

The Complete Auto test should be applied in this case. It ensures that state taxes do not disrupt the national economy by burdening or discriminating against interstate commerce,[11]

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[11] The United States Supreme Court has long-recognized that a lack of economic union among the states will be at the expense of political union (*see, Oklahoma Tax Comm'n v Jefferson Lines, Inc.*, 514 U.S. 175, 179-183, 131 L. Ed. 2d 261, 115 S. Ct. 1331; *Complete Auto Transit., Inc. v Brady*, 430 U.S. 274, 280-284, 51 L. Ed. 2d 326, 97 S. Ct. 1076 [both compiling cases and recounting history]; *Gibbons v Ogden*, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 [1824] [Marshall, C.J., in dictum]). As a result, the Commerce Clause had to have a dormant or negative aspect that prohibited the states from erecting barriers to the free flow of trade and commerce across state lines. (*see, Camps Newfound/Owatonna v Town of Harrison*, ___ U.S. ___, 117 S. Ct. 1590, ___, 137 L. Ed. 2d 852, 1997 U.S. LEXIS 3227, *14). This dormant aspect may be as, if not more, important than Congress's power to regulate under the Commerce Clause in order to ensure the "united" in United States (see, The Federalist Nos. 42 (Madison); 7 & 11 (Hamilton). The dormant Commerce Clause also works to prevent the problem of taxation without representation. A tax on a non-domiciliary, which means he or she does not vote in the taxing

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while at the same time allowing for state taxation of those activities that are properly attributable to a state (*Quill Corp. v North Dakota*, 504 U.S. 298, 312, 119 L. Ed. 2d 91, 112 S. Ct. 1904). Specifically, here, the Complete Auto test applies because New York is taxing out-of-state domiciliaries who travel across state lines for economic or commercial purposes. Such a situation requires an analysis as to whether the state tax violates the dormant Commerce Clause and does not infringe upon its protection of the free flow of trade and economic activity across state borders. The United States Supreme Court has consistently applied this test to determine whether a state tax that substantially affects interstate commerce is constitutional under the dormant Commerce Clause (*Goldberg v Sweet*, 488 U.S. 252, 261, 102 L. Ed. 2d 607, 109 S. Ct. 582; *Tyler Pipe Indus., Inc. v Washington State Dept. of Rev.*, 483 U.S. 232, 247, 107 S. Ct. 2810, 97 L. Ed. 2d 199; *Armco, Inc. v Hardesty*, 467 U.S. 638, 647-648, 81 L. Ed. 2d 540, 104 S. Ct. 2620).

The pertinent part of the Complete Auto test in this case, as Petitioners argue, is whether the tax is fairly apportioned. Fair apportionment, in the verbiage of taxation, means that the state tax is "internally consistent" (*see, Container Corp. of America v Franchise Tax Board*, 463 U.S. 159, 169, 77 L. Ed. 2d 545, 103 S. Ct. 2933; *Goldberg v Sweet*, 488 U.S. at 261). As the United States Supreme Court has repeatedly held, a reviewing court determines "internal consistency" by supposing that all the states have adopted the state taxing scheme at issue and then determines whether there is the risk of multiple taxation (*Oklahoma Tax Comm'n v Jefferson Lines, Inc.*, 514 U.S. 175, 179, 131 L. Ed. 2d 261, 115 S. Ct. 1331; *Tyler Pipe Indus., Inc. v Washington State Dept. of*

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state, is "not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state" (*McGoldrick v Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2, 84 L. Ed. 565, 60 S. Ct. 388).

Rev., 483 U.S. 232, 235-236, 107 S. Ct. 2810, 97 L. Ed. 2d 199; *Armco, Inc v Hardesty*, 467 U.S. at 638; *Container Corp. of America v Franchise Tax Board*, 463 U.S. at 169).

The New York tax scheme fails that test. Assuming that all other states adopted New York's tax law, there would be the risk of multiple taxation of a taxpayer's income from intangible assets. If New York's tax law applied in all states, an individual who spent a portion of over 183 days in three states and maintained a residence in each of these three states would have to pay tax on their income from intangible assets in all three. Multiple taxation is the event to be avoided, but New York has not avoided that risk in its tax law. The fact that in this case New Jersey granted the petitioners a tax credit for the taxes paid on income from intangibles does not change the analysis (see, N.J. Stat. Ann. §54A:4-(a)). The United States Supreme Court has been clear that only the risk of multiple taxation is required (*see, Goldberg v Sweet*, 488 U.S. at 261; *Armco, Inc. v Hardesty*, 467 U.S. at 645). "Any other rule would mean that the constitutionality of [a state's tax] laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated" (*Armco, Inc. v Hardesty*, 467 U.S. at 644-645). In other words, all that is required under the internal consistency test is the risk of multiple taxation, and here, there is a clear risk of a multiple taxation burden.

New York could have avoided this burden by recognizing a credit for taxes paid to other states on income from intangible assets (*cf. Goldberg v. Sweet*, 488 U.S. at 263-264 [Illinois's credit for taxes paid to other states cured multiple taxation problem]). New York, however, has not removed the risk of multiple taxation through a tax credit. As a result, the statute that triggers this risk, Tax Law section 605(b)(1), is unconstitutional under the dormant Commerce Clause.

The majority argues that the Complete Auto test should not apply. It, in essence, states that the test should not be

used because it would be impossible to find discrimination against interstate commerce in this case. Relying on *General Motors Corp. v Tracy*, (519 U.S. 278, 117 S. Ct. 811, 136 L. Ed. 2d 761), the majority asserts that before there can be a finding of discrimination there must be "similarly situated" in-state and out-of-state participants in an "identifiable interstate market." It asserts that the Tamagnis' situation here does not fit within this framework. As the Supreme Court has noted, "The fact that [a state tax] has the advantage of appearing nondiscriminatory does not save it from invalidation" [12] (*Tyler Pipe Indus., Inc. v Washington State Dept. of Rev.*, 483 U.S. at 248).

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[12] As the court in *General Motors Corp. v Tracy* noted, many dormant Commerce Clause cases exhibit both an "undue burden on" and "discrimination against" interstate commerce (519 U.S. 278, ___, 117 S. Ct. 811, 824 n.12, 136 L. Ed. 2d 761). This "discrimination framework" is present here, and also demonstrates that New York's tax may fail. Out-of-state domiciliaries are similarly situated to New York domiciliaries. Each has the same relationship to his or her state of domicile and is subject to tax there. But under New York's tax law, those out-of-state domiciliaries that cross into New York to work, and thus participate in the labor market, and who also maintain a place to live in New York, and thus participate in the property market, are subject to the risk of multiple taxation. Those persons domiciled in New York and who also work and buy or rent property in New York are not subject to this risk. As a result, New York's tax law discriminates against out-of-state participants in its labor and property markets because the risk attendant on that participation are not borne by both New York and out-of-state domiciliaries. New York domiciliaries have an advantage in that their working and having a place to live in New York would not risk multiple taxation.

Furthermore, the majority's analysis is flawed in one other simple respect. To require an "identifiable interstate market" would mean that a market which is protected by state regulation to the exclusion of interstate competition could never present a dormant Commerce Clause problem because that market could never meet the threshold showing that it was an interstate market. To the contrary, "our system fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he [or she] will have free access to every market in the Nation . . ." (*General Motors Corp. v Tracy*, 519 U.S. 278, ___, 117 S. Ct. 811, 824, 136 L. Ed. 2d 761, quoting *H.P.*

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The majority analysis is inapposite. The dormant Commerce Clause protects against two impediments to interstate commerce. One is discrimination and the other is undue burden (see, *Quill Corp. v North Dakota*, 504 U.S. at 312 [noting these two protections under the dormant Commerce Clause]). A state may not discriminate against out-of-state participants in interstate commerce in favor of in-state interests, but a state also may not impose cumulative burdens on interstate commerce (*id.*). This case is an undue burden case (*see, e.g., Kassel v Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 67 L. Ed. 2d 580, 101 S. Ct. 1309). The Tamagnis come to New York to work and have bought property in the state, but they are discouraged from doing so by the burden that the New York tax law creates. The dormant Commerce Clause prohibits such tax burdens unless they comply with *Complete Auto*. It does not logically follow from the fact that there may or may not be discrimination against interstate commerce in this case that there is no undue burden on interstate commerce (see, *Quill Corp. v North Dakota*, 504 U.S. at 312). Discrimination against interstate commerce is only one prong of the Complete Auto test and is only one of the problems to be avoided.

The majority relies on *Oklahoma Tax Comm'n v Jefferson Lines, Inc.*, (514 U.S. 175, 131 L. Ed. 2d 261, 115 S. Ct. 1331) to conclude that if the Complete Auto test

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Hood & Sons v DuMond, 336 U.S. 525, 539, 93 L. Ed. 865, 69 S. Ct. 657).

The majority takes the narrow exception of *General Motors Corp. v Tracy* as the rule. In that case, the court recognized that the captive, noncompetitive, residential natural gas market was so local and the product it distributed so essential to health and safety that the state could subject local distribution companies which served that market to different tax treatment (519 U.S. 278, 117 S. Ct. 811, 136 L. Ed. 2d 761). Here, there is no intimation that such an exceptional circumstance exists in the New York property or labor markets.

applies in this case there is no need for fair apportionment because New York is taxing a resident, which is a "separable local occurrence" in New York. Residency under New York's definition, according to the majority, is incapable of repetition elsewhere. As the internal consistency test shows, the interstate activities on which the tax is based are capable of repetition in another state (*see*, *Goldberg v Sweet*, 488 U.S. at 262-264 [other states could tax interstate phone calls which Illinois taxed]).

The activities here are not purely local. New York's tax on residents cannot be likened to a sales tax on a bus ticket as was upheld in *Oklahoma Tax Comm'n v Jefferson Lines, Inc.*. The sale of a bus ticket is a "separable local" event. The bus ticket would only be sold once, and thus the state in which this one event occurred could tax it. Similarly, in *Western Live Stock v Bureau of Revenue* : "All the events upon which the tax is conditioned – the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it -occur in [just one state] and not elsewhere" (303 U.S. 250, 260). The subject of a tax is not a local event where, as here, it is conditioned on a domiciliary of another state coming to New York 184 times a year who engages in commercial activity. New York's tax does not fall on a local event. It is triggered by interstate commercial activity, and falls not on a local event, but on the income from intangible assets which are capable of being taxed elsewhere. The failure to fairly apportion the tax in such an instance, as New York has failed to do here, is fatal.

Even assuming the tax burdens interstate commerce, the majority then goes on to hold that the tax New York imposes is constitutionally sufficient on state sovereignty grounds. The dormant Commerce Clause, it says, is inapplicable to state resident income taxation, which is a state's traditional prerogative. A state, of course, is not prohibited from taxing its residents and, moreover, a state may define its residents in any way that comports with due process (see, *Shaffer v Carter*, 252 U.S. 37, 64 L. Ed. 445, 40 S. Ct. 221).

What a state may not do, however, is impose cumulative burdens on interstate commerce, or, in other words, a state may not impose the risk of multiple taxation on those engaging in interstate commerce. Although the majority cites many due process cases for the proposition that multiple taxes on the same income of a resident is constitutional, it will not find, and cannot cite one dormant Commerce Clause case that so holds. The Due Process Clause, on which the majority relies, and the dormant Commerce Clause, "are animated by different constitutional concerns and policies" (*Quill Corp. v North Dakota*, 504 U.S. 298, 312, 119 L. Ed. 2d 91, 112 S. Ct. 1904). Due process concerns "the fundamental fairness of governmental activity" (*id.*). The dormant Commerce Clause involves "structural concerns about the effects of state regulation on the national economy" including "state taxes and duties [that have] hindered and suppressed interstate commerce" (*id.*). While imposing a tax may be "fundamentally fair," the state tax may nonetheless be constitutionally infirm because it "hinders and suppresses interstate commerce" (*cf. id.*, at 312-313). Jurisdiction to tax and burdening interstate commerce involve different constitutional concerns.[13]

Although it is a state's traditional prerogative to tax its residents, it is not a state's prerogative to unduly burden interstate commerce. The main case that the majority relies on, *National League of Cities v Usery* (426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465), was concededly overruled nine years later by *Garcia v San Antonio Metropolitan Transit Authority*, (469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005). There is simply no state sovereignty exception to the dormant Commerce Clause.

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[13] The "Complete Auto test, while responsive to Commerce Clause dictates, encompasses as well . . . due process requirements" (*Trinova Corp. v Michigan Dept. of Treasury*, 498 U.S. 358, 373, 112 L. Ed. 2d 884, 111 S. Ct. 818).

Here, by failing to grant a tax credit for taxes paid to other states on income from intangible assets, New York has created the risk of multiple taxation. That violates the dormant Commerce Clause, and I dissent.

APPENDIX B

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter of John S. Tamagni et al.,

Petitioners,

v.

Tax Appeals Tribunal of the State of New York et al.,

Respondents

76339

June 19, 1997, Decided

June 19, 1997, Entered

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Third Judicial Department pursuant to Tax Law §2016) to review a determination of respondent Tax Appeals Tribunal which sustained a personal income tax assessment imposed under Tax Law article 22.

Casey, J.

Under New York's personal income tax statute, individuals who are not domiciled in New York but who nevertheless maintain a "permanent place of abode" and spend more than 183 days in New York are considered "statutory residents" (Tax Law §605 [b] [1] [B]) and, as resident individuals, are liable for State income tax on all of their income regardless of its source (Tax Law §611, 612). Petitioner John S. Tamagni is an investment banker and he has worked for Lazard Freres in its main office in New York City for 21 years. Although during the years at issue petitioners were domiciliaries of New Jersey, they also owned a cooperative apartment in New York City. Pursuant to a field audit, the Department of Taxation and Finance issued a notice of deficiency to petitioners indicating that

they owed additional personal income taxes for the 1987, 1988 and 1989 tax years as a result of their improper filing as nonresidents of New York State and New York City. The basis of the additional State and City tax assessments was the Department's conclusion that petitioners were residents of New York State and New York City pursuant to Tax Law §605 (b) (1) (B) and Administrative Code of the City of NY §11-1705 (b).[1]

A hearing was thereafter held after which an Administrative Law Judge (hereinafter ALJ) concluded, inter alia, that petitioners were present- for more than 183 days in both New York State and New York City in 1988 and in only New York State in 1989. The ALJ declined to consider petitioners' claims that the definition of residency in Tax Law §605 (b) (1) (B) violated the Federal and State Constitutions, finding that he lacked jurisdiction to do so.

Upon administrative appeal, respondent Tax Appeals Tribunal affirmed the ALJ's determination with regard to the number of days spent in New York City and New York State in the years in question. The Tribunal, unlike the ALJ, addressed the constitutional issues raised by petitioners. The Tribunal first rejected petitioners' claim that their susceptibility to both New York and New Jersey income tax for their income from intangibles violates the Commerce Clause of the US Constitution. It also held that petitioners failed to demonstrate that treating them as New York residents for income tax purposes violated NY Constitution, article XVI, §3. Petitioners thereafter commenced this CPLR article 78 proceeding challenging the constitutionality of the taxing statute on these various grounds.[2]

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[1] The definition of "resident" in Administrative Code of City of NY §11-1705 (b) is identical to that provided in Tax Law §605 (b) (1) (B) except for the substitution of the term "city" for "state".

[2] We initially note that "a CPLR article 78 proceeding is not the proper vehicle for challenging the constitutionality of a statute" (*Matter of Capital Fin. Corp. v Commissioner of Taxation & Fin.*, 218 AD2d 230,

(Footnote Continued on Following Page)

Initially we find, contrary to petitioners' contention, that the Commerce Clause is not implicated here. The Commerce Clause authorizes Congress "[t]o regulate Commerce ...among the several States" (US Const, art I, §8, cl 3) and includes a "negative" component that prevents the states from interfering unduly with interstate commerce (*Associated Indus. v Lohman*, 511 US 641, 646). It is only when "the regulated activity 'substantially affects' interstate commerce" that the Commerce Clause is implicated (*United States v Lopez*, 514 US 549, --, 115 S Ct 1624, 1630). Interstate commerce is defined as "[t]raffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union" (Black's Law Dictionary 819 [6th ed 1990]; see, 20 NYCRR 528.9 [a] [5]).

Unlike the business of transporting individuals between States (*see, e.g., Oklahoma Tax Commn. v Jefferson Lines*, 514 US 175, 185), the practice of commuting from one State to work in another does not produce the requisite effect on commerce. We also reject petitioners' claim that maintaining a residence and spending time in New York -- purchasing utilities, acquiring items of service, utilizing banking facilities and frequenting restaurants and retail establishments -- necessarily involves interstate commerce. To take this argument to its logical conclusion would mean that all New York domiciliaries, not just statutory residents like petitioners, are engaging in interstate commerce simply by being involved in these daily activities, a conclusion we decline to accept. Petitioners' attempt to identify interstate commerce with the constitutional right to interstate travel is also unavailing. First, the United States Supreme Court has concluded that negative Commerce Clause cases are "irrelevant to the individual right of interstate travel" (*Bray v Alexandria Women's Health Clinic*, 506 US 263, 277, n 7).

232, appeal dismissed 88 NY2d 874, lv denied 88 NY2d 811). We therefore convert that portion of this matter seeking such relief into an action for declaratory judgment (see, CPLR 103 [c]).

Furthermore, "[t]he federal guarantee of interstate travel ... protects interstate travelers against two sets of burdens: the erection of actual barriers to interstate movement' and 'being treated differently' from intrastate travelers" (supra, at 276-277, quoting *Zobel v Williams*, 457 US 55, 60, n 6). We find neither burden to be implicated here.

Having so concluded, petitioners' only remaining argument is that New York's imposition of its personal income tax on income from intangibles violates NY Constitution, article XVI, §3. Petitioners claim that, based on the language and legislative history of the statute, domicile is the controlling factor for determining the taxability of intangibles and the income therefrom, and that for ad valorem tax purposes intangibles were not to be taxed at all. Petitioners claim that, in light of these contentions, New York may not constitutionally apply its personal income tax to taxpayers who are not domiciliaries and whose intangibles are not employed in business in New York. We disagree.

Contrary to petitioners' contention, it does not follow from the first sentence of this statute, which provides that the situs of intangibles is "located at the domicile of the owner for purposes of taxation" (NY Const, art XVI, §3), that the income from intangibles owned by a nondomiciliary resident cannot be taxed in New York. Nor does the legislative history support this conclusion (*see*, *Ampco Print.--Advertisers' Offset Corp. v City of New York*, 14 NY2d 11, 22-23, appeal dismissed 379 US 5). Furthermore, petitioners were not taxed on the ownership of intangibles located in New York nor were their intangibles taxed on an ad valorem basis. Rather, they were taxed based on the income generated by those intangibles, which does not offend the State Constitution. Consequently, petitioners' arguments in this regard must fail.

Cardona, P. J., White, Spain and Carpinello, JJ, concur.

Adjudged that the determination is confirmed, without costs, proceeding partially converted to an action for declaratory judgment and it is declared that Tax Law §605 (b) (1) (B) has not been shown to be unconstitutional.

APPENDIX C

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition of

JOHN S. & JANET B. TAMAGNI for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1987 through 1989

DTA No. 811237;
TSB-D-95-(32)I;
Income Tax

November 30, 1995

The Division of Taxation and petitioners John S. and Janet B. Tamagni, c/o Lazard Freres and Co., One Rockefeller Plaza, New York, New York 10020, each filed an exception to the determination of the Administrative Law Judge issued on August 25, 1994. Petitioners appeared by Morrison & Foerster, Esqs. (Arthur R. Rosen and Judith E. Lansky, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donna M. Gardiner, Esq., of counsel).

The Division of Taxation and petitioners each filed briefs in support of their exception, briefs in opposition and reply briefs. Oral argument was heard on June 8, 1995, which date began the six-month period for the issuance of this decision.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

Issues

I. Whether petitioners have established that they were not present in New York State and New York City for more than 183 days during each of the years at issue and, therefore,

were not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) and New York City Administrative Code § 11-1705(b)(1)(B).

II. Whether, if petitioners were properly taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) because they were present in New York for more than 183 days during each of the years at issue, such statutory provision is unconstitutional as applied to petitioners under the so-called "internal consistency test" because they would be taxed more than once on their intangible income.

III. Whether, if petitioners were properly taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B) because they were present in New York for more than 183 days during each of the years at issue, such statutory provision as applied to petitioners violates section 3 of Article XVI of the New York State Constitution by taxing their income from intangibles not employed in a New York business.

IV. Whether petitioners have established that negligence penalties should he abated.

Findings of Fact

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. The Division of Taxation ("Division") issued three statements of audit changes each dated March 3, 1992 against petitioners, John S. and Janet B. Tamagni, showing income tax due of $64,115.51 plus penalty[1] and interest for 1987, $70,353.28 plus penalty and interest for 1988, and $58,072.43 plus penalty and interest for 1989, respectively.

The statement for 1987 showed the following calculation for "corrected N.Y. State taxable income":

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[1] The Division asserted negligence penalties under Tax Law § 685(b) for each of the three years at issue.

N.Y. State adjusted gross income per return		$1,880,952.00
Audit increases to N.Y. State income		
Interest income	$97,460.00	
Dividend income	34,488.00	
New York additions	23,698.00	
Audit decreases to N.Y. State income		
Rents & royalties	19,170.00	
Partnerships	31,616.00	
New York subtractions	20,847.00	
Net adjustments to N.Y. State income		84,013.00
Corrected adjusted gross income		$1,964,965.00
Less: Itemized deductions per return		220,468.00
Four exemptions		3,600.00
Corrected N.Y. State taxable income		$1,740,897.00

The 1987 statement showed a "corrected tax liability" of $150,695.74 for New York State income tax and of $70,688.77 for New York City income tax and "additional tax liability" of $6,512.74 for New York State income tax and of $57,602.77 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of $144,183.00 and $13,086.00, respectively).

The statement for 1988 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return		$2,181,112.00
Audit increases to N.Y. State income		
Interest income	$39,647.00	
Dividends	37,606.00	
Partnerships	24,674.00	
New York additions	161,853.00	
Audit decreases to N.Y. State income		
Capital gains	40,600.00	
Other losses	141.00	
New York subtractions	91,120.00	
Net adjustments to N.Y. State income		131,919.00
Corrected adjusted gross income		$2,313,031.00
Less: Itemized deductions per return		228,991.00
N.Y. itemized deduction adjustment		45,798.20
Corrected itemized deductions after modification		$183,192.80
Two exemptions		2,000.00
Corrected N.Y. State taxable income		$2,127,838.20

The 1988 statement showed a "corrected tax liability" of $177,334.95 for New York State income tax and of $74,029.33 for New York City income tax and "additional tax liability" of $10,320.95 for New York State income tax and of $60,032.33 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of $167,014.00 and $13,997.00, respectively).

The statement for 1989 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return	$1,877,063.00
Audit increases to N.Y. State income	
Interest income	$31,665.00
Dividend income	48,088.00
Capital gain income	47,356.00
New York additions	127,839.00
Audit decreases to N.Y. State income	
Taxable refunds	21,989.00
Partnerships	105,371.00
New York subtractions	78,768.00
Net adjustments to N.Y. State income	48,820.00
Corrected adjusted gross income	$1,925,883.00
Less: Itemized deductions per return	231,909.00
N.Y. itemized deductions adjustment	115,954.50
Corrected itemized deductions after modification	$115,954.50
Two exemptions	2,000.00
Corrected N.Y. State taxable income	$1,807,928.50

The 1989 statement showed a "corrected tax liability" of $141,656.87 for New York State income tax and of $61,141.56 for New York City income tax and "additional tax liability" of $7,733.87 for New York State income tax and of $50,338.56 (after crediting petitioners for New York State income tax and New York City nonresident earnings

tax previously paid of $133,923.00 and $10,803.00, respectively).

In sum, the three statements of audit changes assert the following tax liabilities against petitioners:

	1987	1988
New York State income tax	$6,512.74	$10,320.95
New York City income tax	57,602.77	60,032.33
Totals	$64,115.51	$70,353.28

	1989	Total
New York State income tax	$7,733.87	$24,567.56
New York City income tax	50,338.56	167,973.66
Totals	$58,072.43	$192,541.22

It is observed that the total for additional New York City income tax asserted as due of $167,973.66 represents 87% of the total tax asserted as due against petitioners.

2. The Statement of Audit Changes for 1987 included the following explanation:

"The taxpayers maintained a permanent place of abode in New York City. The taxpayers did not submit adequate records to establish that they spent less than 184 days in New York State & City. Accordingly, we hold the taxpayers as residents of New York State & City. We impose negligence [sic] penalties for failure to establish that there was reasonable cause for the understatement of taxes due."

The statements of audit changes for 1988 and 1989 also included the same explanation as noted above. In addition, the statement for 1988 noted:

"Per audit of Lazard Freres & Co., the New York State allocation has been changed. Partnership income has been increased by $64,763.00. Dividend income has been decreased by $9,448.00."

Similarly, the statement for 1989 noted:

"Per-audit of Lazard Freres & Co., the New York State allocation has been changed. Partnership income has been increased by $31,010.00. Dividend income has been decreased by $5,357.00."

3. The Division then issued a Notice of Deficiency dated July 6, 1992 against petitioners for 1987, 1988 and 1989 showing total income tax due for the three years of $192,541.22, plus penalty and interest. The Notice of Deficiency showed a breakdown of this total which corresponded to the amounts for each of the years noted in Finding of Fact "1". The notice explained that the tax asserted as due was "based on an audit."

Petitioners' Tax Returns

4. For each of the years at issue, petitioners filed a New York State [*8] Nonresident Income Tax Return (Form IT-203) checking the filing status of "married filing joint return". For the years at issue, petitioners reported their income, with allocations to New York State, as follows:

	1987	
	Federal Amount	NYS Amount
Wages & Salaries	$0	$0
Taxable interest income	124,734	78,567
Dividend income	78,432	43,944
Taxable refund of State and local taxes	105,383	105,383
Capital gain or (loss)	3,000	3,000
Other gains or losses	0	0
Rents and royalties[2]	19,170	
Partnerships and S corporations	1,682,216	1,713,832
Other income	0	0
Total	1,968,595	1,938,726

	1988	
	Federal Amount	NYS Amount
Wages & Salaries	$0	$0
Taxable interest income	120,203	31,785
Dividend income	185,099	147,493
Taxable refund of State and local taxes	24,728	0

[2] During 1988 and 1989, "Rents and royalties" were included in the item "Partnerships and S corporations" listed next in the table above.

Capital gain or (loss)	3,000	37,600
Other gains or losses	141	0
Rents and royalties[2]		0
Partnerships and S corporations	1,997,611	1,972,937
Other income	0	0
Total	2,324,500	$2,189,815

	1989	
	Federal Amount	NYS Amount
Wages & Salaries	$0	$0
Taxable interest income	130,545	35,235
Dividend income	195,314	147,226
Taxable refund of State and local taxes	45,023	21,989
Capital gain or (loss)	52,116	4,760
Other gains or losses	0	0
Rents and royalties[2]		
Partnerships and S corporations	1,571,484	1,676,855
Other income	339	339
Total	$1,985,480	$1,877,063

These tax returns were signed by both petitioners. It is further observed that the returns do not disclose the name of any paid preparers.[3]

5. Petitioners' tax returns were complex reports due to their involvement in 14 different partnerships and one subchapter S corporation, in addition to various transactions which produced capital gains and losses. Nonetheless, the source of most of petitioners, income was the partnership,

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[3] Mr. Tamagni testified that the returns were prepared by the tax department at Lazard Freres (tr., p. 247)

Lazard Freres & Co., which passed on to petitioner John S. Tamagni the following items of income and loss:

1987		1988	
Loss	Income	Loss	Income
$9,606.00	$2,011,685.00	$-0-	$2,255,131.00

Loss
$21,117.00

1989		
	Passive	Non-Passive
Loss	Income	Income
$9,606.00	$8,162.00	$1,693,107.00

6. Mr. Tamagni also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of the years at issue reporting net earnings from his self-employment as a partner in Lazard Freres & Co. located at 1 Rockefeller Plaza in midtown Manhattan as follows:

1987	1988	1989
$2,013,290.00	$2,153,410.00	$1,662,060.00

7. The City of New York nonresident earnings tax returns each included the following question:

"Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year? If Yes,[4] give address below and number of days spent in the City of New York during [the particular year]."

[4] The 1987 return did not include the words "If Yes."

For 1987, Mr. Tamagni answered "No" to this question.[5] For 1988, he responded "Yes", noting an Eastside Manhattan address of 29 East 64th Street and 131 days spent in New York City during 1988. For 1989, Mr. Tamagni also responded "Yes", noting the 29 East 64th Street address and 148 days spent in New York City during 1989.

8. As of the hearing date, Mr. Tamagni had been associated with Lazard Freres as an investment banker for 21 years. He described his position as follows:

"I'm a partner in the municipal finance operation of Lazard Freres and the functions of that department and my own activities within it are to assist state and local government financing infrastructure or other capital needs" (tr., p. 46).

His duties require considerable travel throughout the United States.

The Audit

9. The Division offered the testimony of its auditor, Richard Hayes, who first contacted the taxpayers by his letter dated May 9, 1991 mailed to petitioners "c/o Lazard, 1 Rockefeller Plaza, New York, NY 10020", which was the address used by them on their tax returns described above. Mr. Hayes scheduled an appointment at 10:00 A.M. on June 6, 1991 at his office and requested that petitioners:

"Please have available for examination copies of Federal and State income tax returns, supporting schedules, all books, records, worksheets and other documents pertinent to the preparation of your income tax returns.

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[5] Mr. Tamagni testified that he erred in responding "No." He explained that he did not look at every line of his tax returns: "I basically look at the major items and the taxes that I owe" (tr., p. 248).

"Brokerage, savings and checking statements (including cancelled checks, stubs and statements from January 1, 1987 through 12/31/89) [were also requested]."

In addition, Mr. Hayes enclosed a questionnaire that:

"asks taxpayers certain questions regarding which type of business he is employed in. Does he have a place in New York State. If so, when were the living quarters maintained. Is it an apartment, a co-op, a house[?] The number of days spent in New York State for work purposes. Number of dates spent on nonworking days, including holidays, weekends days [sic], sick days . . . " (tr., p. 277).

10. Petitioners' former representative, Charles Stieglitz, responded to the auditor's initial letter and arranged a meeting for June 20, 1991. At the meeting, the auditor examined documents pertaining to the allocation to New York of interest, dividends, capital gains and partnership distributions. However, no records were then provided concerning days spent "in and out of New York State" (tr., p. 274). Mr. Hayes informed Mr. Stieglitz that he "needed to see records to support the number of days the taxpayers spent in New York State" (tr., pp. 276-277), and he gave the former representative a list of documents that he wanted to review:

"diaries, expense reports, credit card statements and slips, bank statements, cancelled checks, phone bills, utility bills [and apparently another copy of the questionnaire described in Finding of Fact "9"]" (tr., p. 277).

The auditor did not receive many of the documents requested:

"At the subsequent meeting or meetings[6] I received for examination taxpayer's diaries. Expense reports but only the

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[6] The record discloses a subsequent meeting on February 20, 1992 attended by petitioners' current representatives and the auditor.

cover sheet of the expense report. There was [sic] no supporting receipts . . . .

* * *

"I received some American Express statements and slips for the period May 1988 through the end of 1989.[7] I did not receive any bank statements. I did not receive any cancelled checks. I did not receive any telephone bills for New York, New Jersey, New Hampshire places of abode of the taxpayer. I did not receive utility bills for the New York/New Jersey home, their places of abode, and I did not receive the audit questionnaire" (tr., pp. 279-280).

It is unknown why petitioners did not introduce into the record similar statements for the entire period mentioned by the auditor.

11. Mr. Hayes disagreed with the position of attorney Arthur Rosen, petitioners' current representative, expressed at a meeting on February 20, 1992 that diaries were sufficient to establish days in and out of New York. According to Mr. Hayes, Mr. Rosen explained that he would protest any assessment and, as noted by the auditor in his log (Division's Ex. "N", p. 8), "would have witnesses and statements [at the

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[7] Included in petitioners' Exhibit "10" are photocopies of the first pages of American Express statements, each one a "Summary of Corporate Card Account" which was in the name of "John S. Tamagni, Lazard Freres Co.", as follows;

Statement of Closing Date	Total Charges
7/15/88	$2,941.21
8/16/88	1,314.24
9/15/88	1,031.24
10/14/88	976.60
11/14/88	1,438.49
1/14/89	920.87

formal hearing] showing the taxpayers are not residents of N.Y." By a letter dated March 3, 1992, Mr. Hayes wrote Mr. Rosen reiterating his position that "adequate records to substantiate that the taxpayers were not in New York State more than 183 days were not submitted for any of the years under examination."

12. The record does not disclose whether the Division was given a reason during the audit why petitioners did not or could not produce the various documents requested by Mr. Hayes. At the hearing, Mr. Tamagni explained that he and his wife did not keep their telephone bills: "After they were paid, they were discarded" (tr., p. 200). Nor did petitioners keep their utility bills for either their New Jersey home or New York City apartment once they had been paid Mr. Tamagni testified that he was unaware that the auditor had requested all of petitioners' cancelled checks, but would have provided them if he "had been asked" (tr., p. 201). Like the telephone and utility bills, Mr. Tamagni indicated that he and his wife did not keep "our personal credit card bills and invoices. After paying them we discarded them" (tr., p. 202).

Furthermore, Mr. Tamagni testified that he was not required "to attach receipts to substantiate expenses" (tr., p. 202) for purposes of his expense reports at Lazard Freres. As a result, petitioners' Exhibits "9", "10" and "11", which are photocopies of Mr. Tamagni's expense reports for his travel expenses incurred in his work on behalf of Lazard Freres & Co., do not include receipts. For example, a report dated March 5, 1987 included in Exhibit "9" shows total travel and entertainment expenses of $2,160.35. Travel expenses were itemized but no receipts were attached:

Date	Place Visited	Transportation	Hotel	Total Expense
1/15/87	Phoenix, AZ	Avis - $47.72	$186.01	$233.73
1/15/87	San Francisco, CA	Air - $219.00	194.60	413.61
1/16/87	San Francisco, CA	Air - $28.00		
	(Alon Kasha)	Air - $28.00		56.00
1/19-20/87	Madison, WI	Air - $496.00	78.40	574.40
1/21/87	Boston, MA	Air - $119.00	197.64	316.64
				$1,594.38

Similarly, entertainment expenses were itemized but no receipts were attached:

Date	Place of Entertainment	Name of Person Entertained	Amount
1/7/87	21 Club	R. Locke - E.F. Hutton	$ 92.94
12/31/86	21 Club	B. Weintrob - Port Authority	106.22
1/12/87	The Sea Grill	W. Watt, M. DelGiudice	186.61
1/14/87	Charley O's	M. DelGiudice	16.65
2/2/87	American Festival	W. Watt	48.38
2/3/87	Ecco	Allan Haack - Port Authority	68.80
2/9/87	Charley O's	W. Watt	46.37
			$ 565.97

It is observed that travel expenses of $1,594.38, plus entertainment expenses of $565.97, equals $2,160.35, the amount Mr. Tamagni claimed on his expense report.

Stipulations

13. The parties executed an undated stipulation, marked into the record as petitioners' Exhibit "1", which provided that petitioners were not domiciled in New York during the years at issue. Rather, petitioners were domiciliaries of New Jersey, where they have resided at 55 Oxbow Lane, Summit, New Jersey for the past 14 years. The parties also executed a second stipulation, marked into the record as petitioners' Exhibit "2", whereby they agreed that petitioners were not present in New York for 33 days in 1987, 31 days in 1988 and 42 days in 1989. The Division did not view the diaries as sufficient substantiation of petitioners' whereabouts which resulted in it stipulating to petitioners, presence outside of New York only for these limited number of days. Mr. Hayes testified as follows:

"[The diaries] were acceptable but they are not sufficient because it is Audit's position or policy to try and ascertain from third party records or other statements such as the American Express, airplane tickets, hotel bills to show that a taxpayer actually did spent time out of New York State" (tr., p. 293).

In particular, the auditor noted that, for many days, the diaries were blank and he could not verify a blank page.

Petitioners' Proof

14. Petitioners offered the testimony of Angela Musalo, an employee of Lazard Freres, who was John Tamagni's executive secretary for the past 20 years in the Municipal Finance Department at Lazard Freres. Petitioners introduced into evidence as their Exhibits "3", "4" and "5" hardcovered and bound diaries for 1987, 1988 and 1989 which Ms. Musalo kept for Mr. Tamagni. She described how she maintained the diaries as follows:

"Well, if Mr. Tamagni had appointments for the day, I would record them. Any travel plans that he made, I would record in the diary with the time of his leaving New York or whatever city he was visiting" (tr., p. 23).

A close review of the diaries discloses that Ms. Musalo also recorded some personal appointments for Mr. Tamagni. For example, for Monday, June 15, 1987, there is a notation "30th Dartmouth College Reunion" and for Wednesday, August 12, 1987 there is an entry showing a theater date in the evening. However, Ms. Musalo testified that she did not "as a general rule, record [Mr. Tamagni's] personal appointments in [her] diary" and that "only when he was in New Hampshire" did she record Mr. Tamagni's weekend activities (tr., p. 26). On cross-examination, she noted that Lazard Freres had a policy requiring all partners to be available on weekends and that "one of the secretaries [would] type up a schedule of all the partners, where they will be for that particular weekend" (tr., p. 32). She added that one of the partners of the firm had the schedules. However, petitioners did not introduce them into evidence.

Ms. Musalo also testified (in response to leading questions on direct examination) that, as a general practice, if Mr. Tamagni had a morning airline flight, he did not come into the office and, similarly, if his return flight arrived after 3:30 P.M., "he usually went home" (tr., p. 29; emphasis added).

John Tamagni's Testimony

15. The transcript of the hearing in this matter consists of 331 pages, of which Mr. Tamagni's testimony constituted over 200 pages. Using Ms. Musalo's diaries, as described in Finding of Fact "14", and his own diaries, which are hardbound engagement books, Mr. Tamagni testified as to

days during the three years at issue when he was not present in New York State/City.[8]

Mr. Tamagni's testimony followed a certain pattern. On Saturdays and Sundays, unless the diaries specifically noted that he was in New York City, Mr. Tamagni testified: "It's my practice to spend my weekends with my wife at home" (tr., p. 77). This response was repeated frequently by the witness with regard to questioning concerning his whereabouts on the weekends. Mr. Tamagni traveled frequently on business trips and since the diaries noted his business trips, he used them to establish other days that he was not present in New York. In addition, he took several vacations which were also noted in the diaries and these too were counted as days that he was not present in New York State/City.

Mr. Tamagni testified that, during the respective months of 1987, he was not in New York on the following days:[9]

		January 1987
Thurs., 1	-	Summit, N.J.
Fri., 2	-	Summit, N.J.
Sat., 3	-	Summit, N.J.
Sun., 4	-	Summit, N.J.
Sat., 10	-	Summit, N.J.
Sun., 11	-	Summit, N.J.
Thurs., 15	-	Outside N.Y. per stipulation
Fri., 16	-	San Francisco
Sat., 17	-	Summit, N.J.
Sun., 18	-	Summit, N.J.

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[8] Occasionally, Mr. Tamagni pointed out days that he was in New York State, but not in New York City.

[9] As noted in Finding of Fact "13," the Division stipulated that petitioners were not present in New York for 33 Days in 1987, 31 days in 1988 and 42 days in 1989. The particular days are included in the count of days petitioners were outside New York in the analysis of Mr. Tamagni's testimony in this Finding of Fact, and such days are referenced by the notation "per stipulation."

Mon., 19 - Madison, Wisconsin
Tues., 20 - Outside N.Y. per stipulation
Wed., 21 - Outside N.Y. per stipulation
Sat., 24 - New Jersey
Sun., 25 - New Jersey
Thurs., 29 - Cleveland
Sat., 31 - New Jersey
Total: 17 days outside New York State/City

February 1987

Sun., 1 - Summit, N.J.
Sat., 7 - Summit, N.J.
Sun., 8 - Summit, N.J.
Wed., 11 - New Hampshire[10]
Thurs., 12 - New Hampshire
Fri., 13 - New Hampshire
Sat., 14 - New Hampshire
Sun., 15 - New Hampshire
Mon., 16 - New Hampshire
Tues., 17 - Summit, N.J.
Wed., 18 - Seattle
Thurs., 19 - Seattle to Summit, N.J.
Sat., 21 - Summit, N.J.
Sun., 22 - Summit, N.J.
Thurs., 26 - Boston
Sat., 28 - Summit, N.J.
Total: 16 days outside New York State/City

March 1987

Sun., 1 - Summit, N.J.
Sat., 7 - Summit, N.J.
Sun., 8 - Summit, N.J.
Sat., 14 - Summit, N.J.
Sun., 15 - Summit, N.J.

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[10] Since 1984, petitioners have owned a vacation home in Grantham, New Hampshire which they use in the summer, fall and winter and rarely in the "kind of muddy" spring (tr., p. 69).

Mon., 16 - Columbia, South Carolina,
Tues., 17 - Outside New York per stipulation
Wed., 18 - Outside New York per stipulation
Thurs., 19 - Outside New York per stipulation
Sat., 21 - Summit, N.J.
Sun., 22 - Summit, N.J.
Tues., 24 - Orlando, Florida
Wed., 25 - Springfield, Missouri
Sat., 28 - Summit, N.J.
Sun., 29 - Summit, N.J.
Total: 15 days outside New York State/City

April 1987

Fri., 3 - Outside New York per stipulation
Sat., 4 - Outside New York per stipulation
Sun., 5 - Out side New York per stipulation
Mon., 6 - San Francisco to Summit, N.J.
Fri., 10 - Grand Rapids, Michigan to Richmond, Virginia
Sat., 11 - Richmond
Sun., 12 - Richmond to Summit, N.J.
Mon., 13 - Santa Fe, New Mexico
Tues., 14 - Santa Fe
Fri., 17 (Good Friday) - Summit, N.J.
Sat., 18 - Summit, N.J.
Sun., 19 (Easter) - Summit, N.J.
Tues., 21 - Cleveland
Wed., 22 - Sacramento
Sat., 25 - Summit, N.J.
Sun., 26 - Summit, N.J.
Tues., 28 - Washington, D.C.
Total: 17 days outside New York State/City

May 1987

Sat., 2	-	Summit, N.J.
Sun., 3	-	Summit, N.J.
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Fri., 15	-	Paris, France
Sat., 16	-	Outside New York per stipulation
Sun., 17	-	Outside New York per stipulation
Mon., 18	-	Outside New York per stipulation
Tues., 19	-	Outside New York per stipulation
Wed., 20	-	Outside New York per stipulation
Thurs., 21	-	Outside New York per stipulation
Fri., 22	-	Outside New York per stipulation
Sat., 23	-	Outside New York per stipulation
Sun., 24	-	Outside New York per stipulation
Mon., 25	-	Outside New York per stipulation
Tues., 26	-	Outside New York per stipulation
Wed., 27	-	Outside New York per stipulation
Thurs., 28	-	Outside New York per stipulation
Fri., 29	-	Outside New York per stipulation
Sat., 30	-	Summit, N.J.
Sun., 31	-	Summit, N.J.

Total: 21 days outside New York State/City

June 1987

Mon., 1	-	Albany, New York
Sat., 6	-	Summit, N.J.
Sun., 7	-	Summit, N.J.
Wed., 10	-	Boston
Fri., 12	-	New Hampshire
Sat., 13	-	New Hampshire
Sun., 14	-	New Hampshire
Mon., 15	-	New Hampshire
Tues., 16	-	New Hampshire
Wed., 17	-	New Hampshire
Fri., 19	-	New Hampshire

Sat., 20 - New Hampshire
Sun., 21 - New Hampshire to Summit, N.J.
Sat., 27 - Summit, N.J.
Sun., 28 - Summit, N.J.
Total: 15 days outside New York City
14 days outside New York State

July 1987

Wed., 1 - Helena, Montana
Fri., 3 - New Hampshire
Sat., 4 - New Hampshire
Sun., 5 - New Hampshire
Mon., 6 - New Hampshire
Wed., 8 - Outside New York per stipulation
Sat., 11 - Summit, N.J.
Sun., 12 - Summit, N.J.
Sat., 18 - Summit, N.J.
Sun., 19 - Summit, N.J.
Sat., 25 - Summit, N.J.
Sun., 26 - Summit, N.J.
Thurs., 30 - San Francisco
Fri., 31 - New Hampshire
Total: 14 days outside New York State/City

August 1987

Sat., 1 - New Hampshire
Sun., 2 - New Hampshire
Mon., 3 - New Hampshire
Tues., 4 - New Hampshire
Sat., 8 - Summit, N.J.
Sun., 9 - Summit, N.J.
Sat., 15 - Summit, N.J.
Sun., 16 - Summit, N.J.
Tues., 18 - Boston[11]

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[11] Mr. Tamagni testified that he was in Boston on August 17, 1987 (tr., p. 101). However, the diaries indicate he was in Boston on August 18, 1987.

Thurs., 20 - Outside New York per stipulation
Sat., 22 - Summit, N.J.
Sun., 23 - Summit, N.J.
Mon., 24 - Summit, N.J. and South Carolina
Sat., 29 - Summit, N.J.
Sun., 30 - Summit, N.J.
Total: 15 days outside New York State/City

September 1987

Thurs., 3 - New Hampshire
Fri., 4 - Outside New York per stipulation
Sat., 5 - Outside New York per stipulation
Sun., 6 - Outside New York per stipulation
Mon., 7 - Outside New York per stipulation
Tues., 8 - New Hampshire and Summit, N.J.
Sat., 12 - Summit, N.J.
Sun., 13 - Summit, N.J.
Thurs., 17 - Baton Rouge, Louisiana and Summit, N.J.
Sat., 19 - Summit, N.J.
Sun., 20 - Summit, N.J.
Wed., 23 - Boston
Sat., 26 - Summit, N.J.
Sun., 27 - Summit, N.J.
Wed., 30 - Philadelphia and Boston
Total: 15 days outside New York State/City

October 1987

Sat., 3 - Summit, N.J. or Boston
Sun., 4 - Summit, N.J. or Boston
Thurs., 8 - Washington, D.C. and Cincinnati
Fri., 9 - Cincinnati and Summit, N.J.
Sat., 10 - Summit, N.J.
Sun., 11 - Summit, N.J.
Tues., 13 - Boston and Summit, N.J.
Sat., 17 - Summit, N.J.
Sun., 18 - Summit, N.J.

Fri., 23	-	Boston
Sat., 24	-	Theater in New York City[12]
Sun., 25	-	Summit, N.J.
Wed., 28	-	Los Angeles
Thurs., 29	-	Outside New York per stipulation
Sat., 31	-	Summit, N.J.

Total: 14 days outside New York State/City

November 1987

Sun., 1	-	Summit, N.J.
Wed., 4	-	San Francisco
Thurs., 5	-	Outside New York per stipulation
Sat., 7	-	Summit, N.J.
Sun., 8	-	Summit, N.J.
Mon., 9	-	South Carolina
Tues., 10	-	Lakewood, N.J.
Fri., 13	-	Outside New York per stipulation
Sat., 14	-	Richmond, Virginia
Sun., 15	-	Richmond, Virginia
Thurs., 19	-	Phoenix, Arizona and Summit, N.J.
Sat., 21	-	Summit, N.J.
Sun., 22	-	Summit, N.J.
Thurs., 26	-	Summit, N.J.
Fri., 27	-	Summit, N.J.
Sat., 28	-	Summit, N.J.
Sun., 29	-	Summit, N.J.

Total: 17 days outside New York State/City

December 1987

Tues., 1	-	San Francisco
Fri., 4	-	Summit, N.J. to Mineola, Nassau County
Sat., 5	-	Summit, N.J.

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[12] Weekend days on which Mr. Tamagni specified he was in New York City are included in these schedules because such testimony is critical to the resolution of this matter as noted in the Conclusions of Law.

Sun., 6	-	Summit, N.J.
Thurs., 10	-	Outside New York per stipulation
Fri., 11	-	Summit, N.J. to North Hempstead, Nassau County
Sat., 12	-	Summit, N.J.
Sun., 13	-	Summit, N.J.
Fri., 18	-	Summit, N.J. to Mineola, Nassau County
Sat., 19	-	Summit, N.J.
Sun., 20	-	Summit, N.J.
Fri., 25	-	Summit, N.J.
Sat., 26,	-	Summit, N.J.
Sun., 27	-	Summit, N.J.
Mon., 28	-	Summit, N.J.
Wed., 30		Summit, N.J. to San Francisco
Thurs., 31	-	San Francisco

Total: 17 days outside New York City
14 days outside New York State

These 1987 monthly totals add up to 193 days outside New York City and 189 days outside New York State for the year, or 172 days present in New York City and 176 days present in New York State.

January 1988

Fri., 1	-	San Francisco
Sat., 2	-	San Francisco and Summit, N.J.
Sun., 3	-	Summit, N.J.
Fri., 8	-	Mineola, Nassau County
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Fri., 15	-	New Hampshire
Sat., 16	-	Outside New York per stipulation
Sun., 17	-	Outside New York per stipulation
Mon., 18	-	New Hampshire to Summit, N.J.
Thurs., 21	-	Phoenix, Arizona

Sat., 23 - Summit, N.J.
Sun., 24 - Summit, N.J.
Wed. 27 - Phoenix, Arizona
Sat., 30 - Summit, N.J.
Sun., 31 - Summit, N.J.
Total: 16 days outside New York City
15 days outside New York State

February 1988

Mon., 1 - Phoenix, Arizona to Summit, N.J.
Sat., 6 - Summit, N.J.
Sun., 7 - Summit, N.J.
Sat., 13 - Summit, N.J.
Sun., 14 - Summit, N.J.
Mon., 15 - Summit, N.J.
Sat., 20 - Summit, N.J.
Sun., 21 - Summit, N.J.
Wed., 24 - Washington, D.C.
Sat., 27 - Summit, N.J.
Sun., 28 - Summit, N.J.
Total: 11 days outside New York State/City

March 1988

Sat., 5 - Summit, N.J.
Sun., 6 - Summit, N.J.
Thurs., 10 - Newark, N.J.
Sat., 12 - Summit, N.J.
Sun., 13 - Summit, N.J.
Tues., 15 - Harrisburg, Pennsylvania
Fri., 18 - Washington, D.C. to Mineola, Nassau County
Sat., 19 - Summit, N.J.
Sun., 20 - Summit, N.J.
Sat., 26 - Summit, N.J.

Sun., 27 - Summit, N.J. but dinner in N.Y.C.
Thurs., 31 - San Francisco
Total: 11 days outside New York City
10 days outside New York State

April 1988

Fri., 1 - Summit, N.J.
Sat., 2 - Summit, N.J.
Sun., 3 - Summit, N.J.
Thurs., 7 - Nashua, New Hampshire
Sat., 9 - Summit, N.J.
Sun., 10 - Summit, N.J.
Wed., 13 - Summit, N.J. to Phoenix, Arizona
Thurs., 14 - Outside New York per stipulation
Fri., 15 Phoenix to Summit, N.J.
Sat., 16 - Summit, N.J.
Sun., 17 - Summit, N.J.
Sat., 23 - Summit, N.J.
Sun., 24 - Summit, N.J. to Charleston, South Carolina
Mon., 25 - Charleston to Summit, N.J.
Fri.,. 29 - New Hampshire
Sat., 30 - New Hampshire
Total: 16 days outside New York State/City

May 1988

Sun., 1 - New Hampshire
Mon., 2 - New Hampshire
Wed., 4 - Seattle
Sat., 7 - Greenwich, Connecticut and Summit, N.J.
Sun., 8 - Greenwich, Connecticut and Summit, N.J.
Mon., 9 - Newark, N.J.
Sat., 14 - Summit, N.J.
Sun., 15 - Summit, N.J.

Wed., 18 - Summit, N.J. to Los Angeles
Thurs., 19 - Outside New York per stipulation
Fri., 20 - Outside New York per stipulation
Sat., 21 - Outside New York per stipulation
Sun., 22 Outside New York per stipulation
Mon., 23 - Bermuda
Sat., 28 - Summit, N.J.
Sun., 29 - Summit, N.J.
Mon., 30 - Summit, N.J.
Total: 17 days outside New York State/City

June 1988

Fri., 3 - Nashua, New Hampshire
Sat., 4 - Summit, N.J.
Sun., 5 - Summit, N.J.
Mon., 6 - Phoenix, Arizona
Fri., 10 - New Hampshire
Sat., 11 - Outside New York per stipulation
Sun., 12 - New Hampshire
Mon., 13 - New Hampshire
Sat., 18 - New York City - departmental meeting
Sun., 19 - Summit, N.J.
Sat., 25 - Summit, N.J.
Sun., 26 - Summit, N.J. to Seattle
Mon., 27 - Seattle
Tues., 28 - Seattle to Summit, N.J.
Total: 13 days outside New York State/City

July 1988

Fri., 1 - New Hampshire
Sat., 2 - Outside New York per stipulation
Sun., 3 - Outside New York per stipulation
Mon., 4 - Outside New York per stipulation
Tues., 5 - New Hampshire to Summit, N.J.
Sat., 9 - Summit, N.J.

Sun., 10	-	Summit, N.J.
Wed., 13	-	Outside New York per stipulation
Thurs., 14	-	Cleveland, Ohio to Summit, N.J.
Fri., 15	-	Summit, N.J. to New Hampshire
Sat., 16	-	Outside New York per stipulation
Sun., 17		Outside New York per stipulation
Mon., 18	-	New Hampshire
Sat., 23	-	Summit, N.J.
Sun., 24	-	Summit, N.J.
Sat., 30	-	New Hampshire
Sun., 31	-	New Hampshire

Total: 17 days outside New York State/City

August 1988

Mon., 1	-	New Hampshire
Tues., 2	-	New Hampshire
Wed., 3	-	New Hampshire to Summit, N.J.
Fri., 5	-	Outside New York per stipulation
Sat., 6	-	Outside New York per stipulation
Sun., 7	-	Outside New York per stipulation
Mon., 8	-	Outside New York per stipulation
Tues., 9	-	Outside New York per stipulation
Wed., 10	-	San Francisco to Summit, N.J.
Sat., 13	-	Summit, N.J.
Sun., 14	-	Summit, N.J.
Sat., 20	-	Summit, N.J.
Sun., 21	-	Summit, N.J.
Sat., 27	-	Summit, N.J.
Sun., 28		Summit, N.J.
Mon., 29	-	[Washington, D.C.[13]]
Tues., 30	-	Summit, N.J. to Omaha, Nebraska

[13] According to Mr. Tamagni, the diaries indicated that he was in Washington, D.C., but he had "no recollection of the trip" (tr., p. 144).

Wed., 31 - [Omaha, Nebraska to Newark, N.J.[14]]

Total: 16 days outside New York State/City (not counting the 29th and 31st)

September 1988

Thurs., 1 - Summit, N.J. to New Hampshire
Fri., 2 - Outside New York per stipulation
Sat., 3 - Outside New York per stipulation
Sun., 4 - Outside New York per stipulation
Mon., 5 - New Hampshire
Sat., 10 - Summit, N.J.
Sun., 11 - Summit, N.J.
Wed., 14 - Outside New York per stipulation
Thurs., 15 - Seattle to Summit, N.J.
Sat., 17 - Summit, N.J.
Sun., 18 - Summit, N.J.
Thurs., 22 - Hartford, Connecticut
Fri., 23 - Summit, N.J. to Nevada
Sat., 24 - Nevada to Summit, N.J.
Sun., 25 - Summit, N.J.
Thurs., 29 - Washington, D.C.

Total: 16 days outside New York State/City

October 1988

Sat., 1 - Summit, N.J.
Sun., 2 - Summit, N.J.
Mon., 3 - Birmingham, Alabama
Tues., 4 - Outside New York per stipulation
Sat., 8 - Summit, N.J.
Sun., 9 - Summit, N.J.
Wed., 12 - Outside New York per stipulation

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[14] Mr. Tamagni noted that he arrived in Newark at 11:30 A.M. and did not recall whether he went to his New York City office on that day (tr., p. 145).

Thurs., 13 - Phoenix to Summit, N.J.
Fri., 14 - New Hampshire
Sat., 15 - New Hampshire
Sun., 16 - New Hampshire
Mon., 17 - New Hampshire to Summit, N.J.
Sat., 22 - Outside New York per stipulation
Sun., 23 - Outside New York per stipulation
Thurs., 27 - Phoenix to Summit, N.J.
Sat., 29 - Summit, N.J.
Sun., 30 - Summit, N.J.
Total: 17 days outside New York State/City

November 1988

Sat., 5 - Outside New York per stipulation
Sun., 6 - Outside New York per stipulation
Wed., 9 - San Francisco/Seattle
Sat., 12 - Summit, N.J.
Sun., 13 - Summit, N.J.
Thurs., 17 - Los Angeles
Sat., 19 - Summit, N.J.
Sun., 20 - Summit, N.J.
Thurs., 24 - Summit, N.J.
Fri., 25 - Summit, N.J.
Sat., 26 - Summit, N.J.
Sun., 27 - Summit, N.J.
Wed., 30 Outside New York per stipulation
Total: 13 days outside New York State/City

December 1988

Thurs., 1 - Outside New York per stipulation
Sat., 3 - Summit, N.J.
Sun., 4 - Summit, N.J.
Sat., 10 - Summit, N.J.
Sun., 11 - Summit, N.J.
Sat., 17 - Summit, N.J.
Sun., 18 - Summit, N.J.

Fri., 23	-	Summit, N.J.
Sat., 24	-	Summit, N.J.
Sun., 25	-	Summit, N.J.
Mon., 26	-	Summit, N.J.
Thurs., 29	-	Washington, D.C.
Fri., 30	-	Summit, N.J.
Sat., 31	-	Summit, N.J.

Total: 14 days outside New York State/City

These 1988 monthly totals add up to 177 days outside New York City and 175 days outside New York State, or 189 days in New York City and 191 days in New York State for 1988. (It is observed that 1988 was a leap year with a total of 366 days.)

January 1989

Sun., 1	-	Summit, N.J.
Mon., 2	-	Summit, N.J.
Sat., 7	-	Summit, N.J.
Sun., 8	-	Summit, N.J.
Fri., 13	-	New Hampshire
Sat., 14	-	New Hampshire
Sun., 15	-	New Hampshire
Mon., 16	-	New Hampshire
Wed., 18	-	Sacramento, California
Thurs., 19	-	Outside New York per stipulation
Fri., 20	-	Utah to New Jersey
Sat., 21	-	Summit, N.J.
Sun., 22	-	Summit, N.J.
Wed., 25	-	Washington, D.C.
Thurs., 26	-	Outside New York per stipulation
Sat., 28	-	Summit, N.J.
Sun., 29	-	Summit, N.J.

Total: 17 days outside New York State/City

February 1989

Fri., 3	-	New Hampshire
Sat., 4	-	New Hampshire
Sun., 5	-	New Hampshire
Mon., 6	-	New Hampshire to Summit, N.J.
Sat., 11	-	Summit, N.J.
Sun., 12	-	Summit, N.J.
Sat., 18	-	Boston
Sun., 19	-	Boston
Mon., 20	-	Boston to Summit, N.J.
Tues., 21	-	Sacramento
Wed., 22	-	Sacramento to Summit, N.J.
Sat., 25	-	Summit, N.J.
Sun., 26	-	Summit, N.J.
Tues., 28	-	Outside New York per stipulation

Total: 14 days outside New York State/City

March 1989

Wed., 1	-	Outside New York per stipulation
Tues., 2	-	Phoenix to Summit, N.J.
Sat., 4	-	Summit, N.J.
Sun., 5	-	Summit, N.J.
Thurs., 9	-	Boston/Washington, D.C.
Sat., 11	-	Summit, N.J. but also theater in New York City
Sun., 12	-	Summit, N.J.
Mon., 13	-	Outside New York per stipulation
Tues., 14	-	Washington, D.C. to Summit, N.J.
Fri., 17	-	Columbia, South Carolina
Sat., 18	-	Summit, N.J.
Sun., 19	-	Summit, N.J.
Wed., 22	-	Phoenix, Arizona
Thurs., 23	-	Phoenix, to Summit, N.J.
Fri., 24	-	Summit, N.J.
Sat., 25	-	Summit, N.J.

Sun., 26 - Summit, N.J.
Total: 16 days outside New York State/City

April 1989

Sat., 1 - Summit, N.J.
Sun., 2 Summit, N.J. to Portland, Maine
Mon., 3 - Augusta, Georgia to Summit, N.J.
Sat., 8 - Summit, N.J.
Sun., 9 - Summit, N.J.
Thurs., 13 - Phoenix, Arizona to Summit, N.J.
Sat., 15 - Summit, N.J.
Sun., 16 - Summit, N.J.
Wed., 19 - Outside New York per stipulation
Thurs., 20 - Outside New York per stipulation
Fri., 21 - Outside New York per stipulation
Sat., 22 - Outside New York per stipulation
Sun., 23 - San Francisco to Summit, N.J.
Fri., 28 - Boston/Richmond, Virginia
Sat., 29 - Richmond
Sun., 30 - Richmond
Total: 16 days outside New York State/City

May 1989

Sat., 6 - Outside New York per stipulation
Sun., 7 - Outside New York per stipulation
Sat., 13 - Summit, N.J.
Sun., 14 - Outside New York per stipulation
Fri., 19 - Los Angeles to Summit, N.J.
Sat., 20 - Summit, N.J.
Sun., 21 - Summit, N.J.
Fri., 26 - Outside New York per stipulation
Sat., 27 - Outside New York per stipulation
Sun., 28 - Outside New York per stipulation
Mon., 29 - Outside New York per stipulation
Tues., 30 - Outside New York per stipulation
Total: 12 days outside New York State/City

June 1989

Sat., 3	-	Summit, N.J.
Sun., 4	-	Summit, N.J.
Sat., 10	-	Summit, N.J.
Sun., 11	-	Summit, N.J.
Sat., 17	-	Summit, N.J.
Sun., 18	-	Summit, N.J.
Sat., 24	-	Summit, N.J.
Sun., 25	-	Summit, N.J.
Tues., 27	-	Albany to Summit, N.J.
Fri., 30	-	New Hampshire

Total: 10 days outside New York City
9 days outside New York State

July 1989

Sat., 1	-	Outside New York per stipulation
Sun., 2	-	Outside New York per stipulation
Mon., 3	-	Outside New York per stipulation
Tues., 4	-	Outside New York per stipulation
Wed., 5	-	Outside New York per stipulation
Thurs., 6	-	Outside New York per stipulation
Fri., 7	-	Outside New York per stipulation
Sat., 8	-	New Hampshire
Sun., 9	-	New Hampshire to Summit, N.J.
Thurs., 13	-	Outside New York per stipulation
Fri., 14	-	San Francisco
Sat., 15	-	Summit, N.J.
Sun., 16	-	Summit, N.J.
Tues., 18	-	Outside New York per stipulation
Fri., 21	-	Lansing, Michigan
Sat., 22	-	Summit, N.J.
Sun., 23	-	Summit, N.J.
Tues., 25	-	Danvers, Massachusetts

Sat., 29 - Summit, N.J.
Sun., 30 - Summit, N.J.
Total: 20 days outside New York State/City

August 1989

Sat., 5 - Summit, N.J.
Sun., 6 - Summit, N.J.
Mon., 7 - Syracuse, New York
Thurs., 10 - Detroit, Michigan to Summit, N.J. to New Hampshire
Fri., 11 - Outside New York per stipulation
Sat., 12 - Outside New York per stipulation
Sun., 13 - Outside New York per stipulation
Mon., 14 - Outside New York per stipulation
Tues., 15 - Outside New York per stipulation
Wed., 16 - Outside New York per stipulation
Thurs., 17 - Seattle to Summit, N.J.
Sat., 19 - Summit, N.J.
Sun., 20 - Summit, N.J.
Thurs., 24 - Syracuse, New York
Fri., 25 - Boston
Sat., 26 - Summit, N.J.
Sun., 27 - Summit, N.J.
Thurs., 31 - New Hampshire
Total: 18 days outside New York City
16 days outside New York State

September 1989

Fri., 1 - Outside New York per stipulation
Sat., 2 - Outside New York per stipulation
Sun., 3 - Outside New York per stipulation
Mon., 4 - Outside New York per stipulation
Tues., 5 - New Hampshire to Summit, N.J.
Sat., 9 - Summit, N.J.
Sun., 10 - Summit, N.J.
Thurs., 14 - Boston

Sat., 16 - Summit, N.J.
Sun., 17 - Summit, N.J.
Wed., 20 - Syracuse, New York
Sat., 23 - Summit, N.J.
Sun., 24 - Summit, N.J.
Wed., 27 - Boston
Sat., 30 - Outside New York per stipulation
Total: 15 days outside New York City
14 days outside New York State

October 1989

Sun., 1 - Outside New York per stipulation
Mon., 2 - New Hampshire to Summit, N.J.
Thurs., 5 - Bloomington, Minnesota from Summit, N.J.
Sat., 7 - Summit, N.J.
Sun., 8 - Summit, N.J.
Wed., 11 - Washington, D.C. from Summit, N.J.
Sat., 14 - Summit, N.J.
Sun., 15 - Summit, N.J.
Sat., 21 - Summit, N.J.
Sun., 22 - Summit, N.J.
Thurs., 26 - Phoenix, Arizona
Sat., 28 - Summit, N.J.
Sun., 29 - Summit, N.J.
Total: 13 days outside New York State/City

November 1989

Thurs., 2 - Phoenix, Arizona from Summit, N.J.
Fri., 3 - Outside New York per stipulation
Sat., 4 - Phoenix, Arizona to Summit, N.J.
Sun., 5 - Summit, N.J.
Sat., 11 - Summit, N.J.
Sun., 12 - Summit, N.J.
Mon., 13 - Phoenix, Arizona from Summit, N.J.
Tues., 14 - Phoenix, Arizona to Summit, N.J.

Fri., 17	-	Boston
Sat., 18	-	Summit, N.J.
Sun., 19	-	Summit, N.J.
Wed., 22	-	Phoenix, Arizona from Newark, N.J.
Thurs., 23	-	Phoenix to Summit, N.J.
Fri., 24	-	Summit, N.J.
Sat., 25	-	Summit, N.J.
Sun., 26	-	Summit, N.J.
Mon., 27	-	Phoenix, Arizona from Summit, N.J.
Tues., 28	-	Outside New York per stipulation
Wed., 29	-	Outside New York per stipulation
Thurs., 30	-	Outside New York per stipulation

Total: 20 days outside New York State/city

December 1989

Fri., 1	-	Boca Raton, Florida
Sat., 2	-	Summit, N.J.
Sun., 3	-	Summit, N.J.
Wed., 6	-	Phoenix, Arizona from Summit, N.J.
Thurs., 7	-	Phoenix to Summit, N.J. to Washington, D.C.
Sat., 9	-	Summit, N.J.
Sun., 10	-	Summit, N.J.
Fri., 15	-	Chicago, Illinois to Summit, N.J.
Sat., 16	-	Summit, N.J.
Sun., 17	-	Summit, N.J.
Fri., 22	-	Harrisburg, Pennsylvania
Sat., 23	-	Summit, N.J.
Sun., 24	-	Summit, N.J.
Mon., 25	-	Summit, N.J.
Tues., 26	-	Summit, N.J.
Sat., 30	-	Summit, N.J.
Sun., 31	-	Summit, N.J.

Total: 17 days outside New York State/City

These 1989 monthly totals add up to 188 days outside New York City and 184 days outside New York State, or 177 days in New York City and 181 days in New York State.

16. During the auditor's testimony at the hearing, certain discrepancies between the diaries (Petitioners' Ex. "3" through "8") and the expense reports (Petitioners' Ex. "9" through "11") were alleged. The first related to November 4, 1987. The diaries indicated that Mr. Tamagni was in San Francisco on November 4th and 5th, but the expense reports indicated a charge in San Francisco for November 2nd and that Mr. Tamagni was in San Francisco from November 2nd through 4th (tr., pp. 285-286). The charge on November 2nd related to the use of an airplane. However, there were no other charges for the dates on the expense report (tr., pp. 304-305).

The next inconsistency raised by the auditor concerned August 25, 1988 because Mr. Tamagni's diary noted a meeting in New York City, while Ms. Musalo's diary stated "Cleveland" (tr., pp. 287-288). However, Ms. Musalo's diary also indicated that "Cleveland" as "cancelled" so that the auditor's focus on this date is inexplicable. Similarly, although it was not clear from his direct examination what the alleged inconsistency was, on cross-examination, the auditor explained that there were no entries in Mr. Tamagni's diary for August 26th through the 28th, yet there were charges for the 28th and 30th (tr., pp. 305-307). The auditor did not explain why a charge on August 30th was relevant to what the diary indicated for August 26, 27, and 28. In addition, Mr. Tamagni did not claim that he was out of New York on August 26, 1988.

On Thursday, October 13, 1988, according to Ms. Musalo' diary, Mr. Tamagni was returning from Phoenix, Arizona. In addition, the Division produced an American Express charge for the Holiday Inn in White River Junction, Vermont, signed by Mrs. Tamagni for such date. The auditor raised these facts to demonstrate that petitioners did not always travel together. However, this was consistent

with petitioners' testimony that Mrs. Tamagni rarely traveled with her husband on business (tr., pp. 64, 220 and 307). Moreover, the diaries indicated New Hampshire for that weekend. Petitioners provided the following reason for the Vermont hotel charge for a date on which Mr. Tamagni was in Phoenix: Mrs. Tamagni picked her husband up at the airport and they stopped at a hotel for the night on their way up to New Hampshire for the weekend (tr., pp. 308-310).

Finally, when questioned about inconsistencies, the auditor raised January 18, 1989. Ms. Musalo's diary indicated that Mr. Tamagni left LaGuardia Airport at 6:30 A.M. for Chicago. The auditor questioned whether Mr. Tamagni slept at his New York City apartment the previous night in light of the early departure (tr., p. 291). Mr. Tamagni noted that from his Manhattan apartment to John F. Kennedy Airport took 40 minutes to travel, while from his New Jersey home to Kennedy Airport took 70 minutes, only 30 minutes longer (tr., p. 204).

These alleged discrepancies were the only ones raised by the Division at the hearing. In short, out of 1,096 days at issue during 1987, 1988 and 1989, discrepancies were claimed with respect to only a handful of days. In fact, on cross-examination, the auditor acknowledged that there were not many discrepancies between the diaries and the expense reports – only one or two during the three years at issue (tr., pp. 312-313).

17. Petitioners contend that in addition to the days listed above as days outside New York, Mr. Tamagni did not go into work in New York City due to illness on one or two days per year:

Attorney Rosen: "Mr. Tamagni, are there times during 1987, '88 and '89 when you did not go to your office in New York because you were not feeling well?"

John Tamagni: "I had an occasional sick day, yes."

Attorney Rosen: "What is your guess about how many days a year that would be?"

John Tamagni: "I'm healthy. One or two days a year."

Attorney Rosen: "One or two days a year. Do you have to keep track of your sick days? Do you have an allocated number of sick days?"

John Tamagni: "No." (tr., pp. 117-118.)

Mr. Tamagni was then queried by his attorney concerning days during the years at issue which appear blank in the diaries on which he "might have been" sick (tr., p. 118).

18. Petitioners also contend that Mr. Tamagni occasionally took an extended weekend by taking off a Monday or Friday:

Attorney Rosen: "The days I asked for 1987, '88, '89 [when Mr. Tamagni might have been sick] are Fridays and Mondays that appear blank in your diary. Did you ever take three-day weekends during those years as far as being at home in New Jersey?"

John Tamagni: "On rare occasions."

Attorney Rosen: "Once or twice?"

John Tamagni: "Once or twice." (tr., p.199.)

19. There were some days which Mr. Tamagni might have claimed to have been outside New York based upon entries or the lack of entries in the diaries, but, instead, he treated such days as New York days:

Day and Transcript Page	Mr. Tamagni's Position
August 13, 1987 pp. 99-100	Conceivably could have been in N.Y.C. apartment morning of flight from LaGuardia to Albany
September 28, 1987 P. 106	Business meeting at night in N.Y.C. after return from Columbia, South Carolina.
October 1, 1987 p. 107	In Mineola, Nassau County, but could have spent part of day in N.Y.C.
February 10, 1988 p. 125	In North Hempstead, Nassau County, but conceivably was also in N.Y.C. that day.
March 17, 1988 p. 128	In Washington, D.C., but might have spent night before in N.Y.C. and left for airplane from N.Y.C. apartment.
April 20, 1988 p. 132	In Rocky Hill, Connecticut, but does not recall whether he left from New York or New Jersey.
August 29, 1988 pp. 144-145	Diaries indicate Washington, D.C., but had no recollection of the trip.
October 31, 1988 p. 152	In Hartford, Connecticut, but probably left from N.Y.C.
November 10, 1988 p. 153	On return from Seattle at 8:40 P.M. went to N.Y.C. apartment.

October 31, 1989 No reference in transcript	Diary says in Syracuse, but petitioner did not claim outside N.Y.C.

20. The testimony of petitioner Janet Tamagni concerning the number of weekends that petitioners were in New York City varied considerably[15] from her husband's:

Attorney Rosen: "During the years 1987 through 1989, did you ever come to New York City during the week?"

Janet Tamagni: "Yes."

Attorney Rosen: "Do you ever come during the weekends?"

Janet Tamagni: "Very rarely."

Attorney Rosen: "How often would you estimate you would come each year to New York City on the weekends?"

Janet Tamagni. "Maybe five."

Attorney Rosen: "Did you ever come to New York City by yourself on weekends?"

Janet Tamagni: "No."

Attorney Rosen: "Could it have been as much as ten times a year?"

Janet Tamagni: "No."

Attorney Rosen: "Could it have been as much as seven?"

Janet Tamagni: "Me alone or together?"

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[15] Mrs. Tamagni did not enter the hearing room until 12:09 P.M. on the first day of the hearing on September 28, 1994, and she was not present in the hearing room during a large part of the afternoon session on September 28, 1994. It was not until 4:25 P.M. on September 28, 1994, that she testified. In sum, Mrs. Tamagni did not hear most of her husband's testimony.

Attorney Rosen: "Together."

Janet Tamagni: "Anything is possible but–"

Attorney Rosen: "What is your belief?"

Janet Tamagni: "I don't know."

Attorney Rosen: "Could it have been as few as three?"

Janet Tamagni: "No. Probably more like five."

Attorney Rosen: "When you would come to the City on those five times, approximately, a year on the weekends, what would you do?"

Janet Tamagni: "We would go to dinner with some friends. Spend the night. Sometimes come home on Saturday night because Jack likes to, like he said, be home on Sunday to do chores and stuff."

Attorney Rosen: "Do you remember spending a Saturday night in the City?"

Janet Tamagni: "As I say three, four, five times maybe."

Attorney Rosen: "I'm asking the first question I asked and I should re-ask. I'm not talking about nights. The first question I asked was how many times during each of those years would you and Mr. Tamagni come into the City. Not spend the night, come into the City. That was the first question I asked."

Janet Tamagni: "Oh."

Attorney Rosen: "Was that approximately five, more than five, less than five?"

Janet Tamagni: "Maybe a little more than five. I don't know."

Attorney Rosen: "Could be as many as seven?"

Janet Tamagni: "It's possible."

Attorney Rosen: "Could it be ten?"

Janet Tamagni: "I don't know."

Attorney Rosen: "You don't know?"

Janet Tamagni: "I don't remember that far back. I don't know."

Attorney Rosen: "To – "

Janet Tamagni: "I hate to say no because I don't want to lie on the stand but I don't think so."

Attorney Rosen: "Could it – You think it would be more than three?"

Janet Tamagni: "Yes. Bigger than a bread box."

Attorney Rosen: "How many Saturday nights each year, approximately, did you spend in the apartment in New York City?"

Janet Tamagni: "As I said, probably three, four, five."

Attorney Rosen: "Half of the time you would come to the City on the weekends, you'd spend the night on a Saturday?"

Janet Tamagni: "I don't see what difference it makes but I don't remember."

Attorney Rosen: "Do you keep a diary or calendar?"

Janet Tamagni: "No diary; calendar, yeah."

Attorney Rosen: "Do you have that calendar for 1986 to 19–"

Janet Tamagni: "I have no calendar but 1993."

Attorney Rosen: "What did you do with the calendars for '87, '88, '89?"

Janet Tamagni: "I threw them away."

Attorney Rosen: "When did you throw them away?"

Janet Tamagni: "Every year."

Attorney Rosen: "When would you have thrown away the 1987 calendar?"

Janet Tamagni: "1988."

Attorney Rosen: "Subsequent year to the year?"

Janet Tamagni: "You got it."

Attorney Rosen: "Same for '88 through '89?"

Janet Tamagni: "Um-hmm."

Attorney Rosen: "In '89 you threw away '88?"

Janet Tamagni: "Yes." (tr., pp. 254-257.)

21. On direct examination, Mr. Tamagni testified that he purchased the Manhattan apartment at 29 East 64th Street "principally to provide a place that I could spend the night if I had been working late or to reduce the rigors of commutation from Summit, New Jersey" (tr., pp. 46-47). Later in the hearing, it was disclosed during questioning by the Administrative Law Judge that in 1980 or 1981, Mr. Tamagni had purchased a Manhattan apartment at 25 West 54th Street and that the one at 29 East 64th Street was a replacement (tr., p. 206). He also testified that he was aware "in a general way" at the time he purchased the apartment at 29 East 64th Street of the possibility of being treated as a statutory resident of New York if he spent more than 183 days in New York (tr., p. 206).

In contrast, Mrs. Tamagni, a more forthright witness than her husband and certainly less prepared by counsel, provided a broader reason for the purchase of the apartment at 29 East 64th Street:

"My dream had been to be a 'New Yorker' and virtually do what we're being accused of doing now, being a resident..." (tr., p. 264).

22. Petitioners introduced into the record as their Exhibits "12" and "13" affidavits each dated September 23, 1993 of Steven Dowd and Edward Meade, respectively, who were doormen at the "residential building located at 29 East 64th Street in New York City." Mr. Dowd stated that he "never saw Mr. Tamagni at the apartment on weekends, and only occasionally during the week" during the years at issue. Mr. Meade indicated that "it was extremely rare for me to see Mr. Tamagni on weekends" and that he "saw him only occasionally (approximately one or two days each week)" during the years at issue. Both men noted that there are only 46 apartments in the building and Mr. Tamagni is one of the very few who do not live at the building on a full-time basis.

23. The Division introduced into evidence as its Exhibit "R" a Statement of Personal Income Tax Audit Changes dated September 28, 1993, which asserts additional tax for 1988 and 1989 based upon an increase in the allocation to New York of the partnership income of Lazard Freres and Co., if it is determined that petitioners were taxable as nonresidents only.

These alternative calculations result in additional tax of $4,659.32 ($4,238.36, State; $420.96, City) plus negligence penalty and interest for 1988, and of $2,028.35 ($1,826.78, State; $201.57, City) plus negligence penalty and interest for 1989. Petitioners' attorney responded as follows to this alternative calculation:

"We will look into the issue and we concede the partnership changes in the effort. I haven't checked the numbers but if they are consistent with the partnership audit and the other partners, we have no objection" (tr., pp. 299-300).

Petitioners did not contest the alternative calculation in their briefs.

Changes to the Transcript

24. With their brief dated December 2, 1993, petitioners enclosed an errata sheet listing ten errors or discrepancies in

the transcript to which petitioners and the Division agreed. The Division disagreed with four other corrections. In his letter dated December 2, 1993 transmitting petitioners' brief and the errata sheet, attorney Rosen noted "to support [petitioners'] interpretation, we have enclosed a photocopy of the outline I used at the hearing for the direct examination of Mr. Tamagni." By a letter dated February 3, 1994, the Administrative Law Judge wrote the hearing reporter asking her to review the contested "errors". By a letter dated February 18, 1994, the reporter responded that she agreed with the proposed changes since she had misread certain "key strokes". By a letter dated March 16, 1994, the Division's attorney, citing the reporter's letter, noted that it "does not oppose the three enumerated amendments to the transcript." The fourth change requested by petitioners was that Mr. Tamagni's response of "Um-hmm" (tr., p. 116, lines 17-18) was an affirmative response. Since this change was, in fact, a matter of interpretation rather than a correction, the transcript was not changed.

25. Petitioners submitted 37 proposed findings of fact. Proposed findings of fact "1", "2", "3", "5", "10", "11", "13", "14", "17", "18","19", "21", "22", "23", "24", "25", "26", "27", "28", "32", "33", "34","35", "36" and "37" are accepted and incorporated into this determination.

Proposed findings of fact "4", "6", "7", "8", "9", "12", "15", "16", "20" and "29" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

(i) Proposed finding of fact "4" includes the inexact statement that petitioners used their New Hampshire house "during the entire year." Mr. Tamagni testified that they rarely used it during the spring, which was a "muddy" season in New Hampshire (tr., p. 69).

(ii) The number of times petitioners went into New York City on weekends is addressed in Findings of Fact "15" and "20", which set forth Mr. Tamagni's position and Mrs. Tamagni's position, respectively, in this regard. To the extent

the proposed finding of fact "6" suggests that Mr. Tamagni's testimony concerning the amount of time he spent in New York City on weekends should prevail, it is rejected since such matter is properly resolved in the Conclusions of Law.

(iii) Proposed finding of fact "7" is rejected for the same reason that proposed finding of fact "6" was rejected.

(iv) Proposed finding of fact "8" is rejected to the extent it limits the motive for purchasing the Manhattan apartment by excluding Mrs. Tamagni's motivation for purchasing the residence and the use of the term "rarely used" is rejected since the matter of how much time petitioners spent in New York City on weekends is best resolved in the Conclusions of Law.

(v) Proposed finding of fact "9" is rejected to the extent of the use of the inexact term of "rare".

(vi) Proposed finding of fact "12" is rejected to the extent that it states that Ms. Musalo never recorded Mr. Tamagni's personal appointments, which conflicts with Finding of Fact "14". The reference to the transcript at pages 69 and 70 in support of the last sentence of proposed finding of fact "12" is incorrect since the question on pages 69 and 70 at lines 22 through 24 and 1 and 2, respectively, does not reflect what counsel apparently meant to ask.

(vii) Proposed finding of fact "15", references, in its footnote "3", June 26 and August 13, 1987 as exceptions to Mr. Tamagni's practice of generally leaving his home in New Jersey (as opposed to the New York City apartment) if a flight departed before 11:00 A.M. March 17, 1988 was another exception to this practice.

(viii) Proposed finding of fact "16" is rejected to the extent of its use of the phrase "more frequently".

(ix) Proposed finding of fact "20" is rejected to the extent that it states that petitioners' former representative provided the auditor with schedules listing dates on which Mr. Tamagni was not present in New York State/City.

(x) Proposed findings of fact "29" includes the following errors with regard to the days outside New York State/City:

Date	Error
February 17, 1987	Petitioner was also outside New York State/City on this day (tr., p. 81).
March 25, 26 and 27, 1987	Petitioner was in Springfield on March 25, 1987 but in N.Y.C. on March 26 and 27 according to the diaries.
June 11, 1987	Petitioner was in N.Y.C. according to the diaries, and Mr. Tamagni did not suggest otherwise.
August 17, 1987	Petitioner testified that he was in Boston on the 17th, but the diaries indicate he was there on the 18th.
January 6 and 7, 1988	Petitioner was in N.Y.C. on these dates, and Mr. Tamagni did not testify otherwise.
March 17, 1988	Mr. Tamagni testified that he was in Washington, D.C. on this date, but he also indicated that he might have spent the night before and therefore the early morning of the 17th in the N.Y.C. apartment (tr., p. 128).
June 27, 1988	Petitioner was also in Seattle on this day.

July 13, 16 and 17, 1988	These dates were stipulated to by the parties as outside New York State/City, and petitioners therefore counted them twice as days outside New York State/City.
August 31, 1988	As noted in footnote "15", Mr. Tamagni testified that he arrived in Newark at 11:30 A.M. and did not recall whether he then went to his N.Y.C. office on that day.
November 30, 1988 and December 1, 1988	These days were stipulated to by the parties as outside New York State/City and, therefore, petitioners counted them twice.

(xi) Proposed finding of fact "30" is rejected to the extent that it waffles between two days or three days as the number of days which Mr. Tamagni spent, presumably at his home in New Jersey, due to illness or an extended weekend. Such waffling reflects the somewhat speculative nature of petitioners' position in this regard which is addressed in the Conclusions of Law.

(xii) Proposed finding of fact "31" is rejected because it is more in the nature of a conclusion of law.

Petitioners have also proposed 11 conclusions of law. However, there is no requirement in the law or regulations to rule on them (State Administrative Procedure Act § 307[1]).

Opinion

Number of Days

Tax Law § 605(b)(1) [former § 605(a)] defines "resident individual" as someone:

"(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .

"(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

The definition of "resident" for City income tax purposes, pursuant to New York City Administrative Code §11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state."

As the parties stipulated that petitioners were not domiciled in New York during the years at issue, it is only the second part of the definition of "resident individual" at issue herein.

Before considering the number of days petitioners spent in the City/State of New York, it must be determined whether petitioners maintained a permanent place of abode in the City of New York during this period. Although this issue was raised by petitioners in their petition, it was not specifically addressed by the Administrative Law Judge in his determination. Since petitioners have maintained, on exception, that they were not statutory residents of either the City or State of New York during the years at issue, a decision on this threshold issue is required.

20 NYCRR 102.2(e)(1) (which was repealed effective January 29, 1992 and promulgated as 20 NYCRR 105.20[e][1]) defines "permanent place of abode" as a dwelling place permanently maintained by the taxpayer, whether or not owned by the taxpayer, and including a dwelling place owned or leased by such taxpayer's spouse. In *Matter of Evans* (Tax Appeals Tribunal, June 18, 1992, affd *Matter of Evans v. Tax Appeals Tribunal*, 199 AD2d 840, 606 NYS2d 404) we concluded that "one maintains a place of abode by doing whatever is necessary to continue one's living arrangements in a particular dwelling place." As to the requirement that the abode be "permanent", we concluded therein that "the permanence of a dwelling place for purposes of the personal income tax can depend on a variety of factors and cannot be limited to circumstances which establish a property right in a dwelling place."

Based on the evidence produced at the hearing, it is undisputed that petitioners owned and maintained an apartment in the City of New York during the years at issue. For 1988 and 1989, in response to a question on the City of New York Nonresident Earnings Tax form filed by petitioners, they affirmatively indicated that they maintained an apartment or other living quarters in the City of New York. For the year 1987, although they responded to this question in the negative, John Tamagni indicated in his testimony that this response was an error (finding of fact "7"). As a result, we conclude that petitioners maintained a permanent place of abode in the City of New York during the years 1987 through 1989 for purposes of section 605(b)(1)(B) of the Tax Law.

As to the number of days petitioners spent in the City/State of New York during 1987 through 1989, in finding of fact "15," the Administrative Law Judge found that, based on John Tamagni's testimony, he spent 172 days in New York City and 176 days in New York State during 1987; 189 days in New York City and 191 days in New York State during 1988; and 177 days in New York City and 181 days in New York State during 1989. (While petitioners did not take

an exception to this finding, they excepted to the Administrative Law Judge's refusal to accept certain of their proposed findings of fact, among which were that Mr. Tamagni was not in New York City or New York State on either March 17, 1988 or August 31, 1988.)

The Administrative Law Judge determined that Mr. Tamagni's testimony concerning the number of weekend days he was present in New York City was outweighed by the "credible" testimony of his wife, who "persevered in her position" that she and her husband came into New York City five times on the weekends during each of the years at issue and spent three to five Saturday nights in their Manhattan apartment during each of the years. He concluded, therefore, that during each of the years at issue, petitioners spent eight weekend days in New York City and he increased the yearly totals of days present in New York State/City by seven days in 1987, six days in 1988 and seven days in 1989.

Further, he allowed one additional day outside New York based upon Mr. Tamagni's testimony that he had an occasional sick day for each year at issue but no additional days outside New York were allowed for extended weekends. After accounting for weekend days in New York City and after subtracting one sick day from the total number of days petitioners were present in New York State/City during the years at issue, the Administrative Law Judge arrived at the final totals as follows:

Year	Days Present in New York City	Days Present in New York State
1987	178 days	182 days
1988	194 days	196 days
1989	183 days	187 days

Petitioners took exception to this total number of days they were found to have been present in the City and State of New York for each of the years under consideration. In effect, however, petitioners conceded the correctness of the conclusion of the Administrative Law Judge that they were

not present in either New York State or New York City during 1987 for more than 183 days. Further, in their exception, they propose Conclusions of Law that coincide with the Administrative Law Judge's determination that petitioners should have filed as residents of New York State and New York City for 1988. They argue that they were not present in either New York City or New York State for more than 183 days in 1989.

Petitioners argue that: a) the Administrative Law Judge failed to accept that petitioners used their New Hampshire vacation house during the entire year instead of three seasons of the year; b) the Administrative Law Judge improperly focused on the reason that petitioners purchased their cooperative apartment in New York City instead of why they continued to maintain this apartment; c) if Mr. Tamagni was present in New York City on March 17, 1988, it was only for the purpose of boarding an airplane for travel to a destination outside of New York State and, pursuant to 20 NYCRR 105.20(c), such day should not be counted as a day in New York; d) Mr. Tamagni had at least one or two sick days on each of the years at issue; e) schedules of weekend locations from Mr. Tamagni's partnership were unavailable for introduction into evidence; and f) petitioners were present in New York for no more than two weekend days during each of the years at issue.

The Division took exception to so much of the determination as found that petitioners were not residents of New York City or New York State during 1987 and were not residents of New York City during 1989. The Division argues that petitioners have failed to meet their burden of proof to show that they were not present in the City and State of New York for more than 183 days in each of the years at issue and, therefore, they were properly taxed as residents of the City and State for those years.

The Division argues that the Administrative Law Judge, having decided that Mrs. Tamagni's testimony concerning the number of weekend days spent in New York City each

year was more credible than that of her husband, only considered that petitioners spent three Saturday evenings within the City during each of these years. Since the testimony of petitioners was inconsistent, the testimony itself is insufficient to establish that petitioners spent any of the disputed weekend days outside of New York City. Further, the Division argues that Mr. Tamagni did not prove that he actually took at least one sick day each year and that he "was merely guessing" as to whether he took a sick day or not. Accordingly, the Division asserts that he did not meet his burden to show that he actually was outside of New York State/City for at least one day per year due to illness. Finally, the Division agrees with the Administrative Law Judge's finding that based on the testimony of Mr. Tamagni, he might have stayed overnight in New York City on March 16, 1988 and boarded a plane for Washington, D.C. on March 17, 1988, thus spending both days in New York City.

In *Matter of Smith v. State Tax Commn*, (68 AD2d 993, 414 NYS2d 803), the Court held that the taxpayer has the burden of proof to show that he did not spend in excess of 183 days in New York State in the tax year at issue. We find that the Administrative Law Judge fully and correctly considered all of the testimony and evidence presented concerning the number of days petitioners spent in and out of New York State/City during each of the years at issue. The Administrative Law Judge generally relied on the testimony of Mr. Tamagni and his secretary, as buttressed by their respective diaries for the years at issue, in calculating the number of weekdays spent in and out of New York. However, he gave greater weight to the "credible" testimony of Mrs. Tamagni on the issue of weekend days spent in New York City. "On questions of credibility, it is our policy not to disturb the analysis of the Administrative Law Judge barring compelling reasons" (*Matter of Auriemma*, Tax Appeals Tribunal, September 17, 1992). We find no such compelling reasons in this case. Therefore, we sustain the Administrative Law Judge's determination on the number of days spent in the City/State of New York for 1987 through 1989 for the reason set forth in his determination. As to Mr. Tamagni's

presence or absence in New York City on March 16 and 17, 1988, petitioners' representative conceded at oral argument that Mr. Tamagni was present in New York City on March 16. Further, we need not reach the issue raised by petitioners, i.e., if a taxpayer stays overnight in New York City for purposes of boarding a plane the next morning, is the day of departure considered a day in New York. There is no evidence in the record to support petitioners' argument that Mr. Tamagni stayed overnight in New York City on March 16 solely for the purpose of boarding a plane for Washington on March 17. Mr. Tamagni testified that he had no memory of that trip and did not know how he traveled to Washington. Significantly, there is no evidence of when he departed New York for Washington on March 17. As a result, we affirm the determination of the Administrative Law Judge that both March 16 and 17, 1988 were days spent in New York City.

Unconstitutionality

The Administrative Law Judge concluded that petitioners were challenging the facial constitutionality of section 620(a) of the Tax Law and that such a challenge was beyond the jurisdiction of the Division of Tax Appeals. In his determination, he stated:

"moreover, although petitioners contend that they are questioning the constitutionality of Tax Law § 605(b)(1) and its New York City Administrative Code counterpart as applied to them, in actuality they are challenging the constitutionality on its face of Tax Law § 620(a), which allows a credit for income tax paid to another state, but which has been interpreted not to allow a credit for taxes paid on income from intangibles (*see, Matter of Mallinckrodt*, Tax Appeals Tribunal, November 12, 1992). Therefore, petitioners' constitutional arguments may not be addressed given the lack of jurisdiction of the Division of Tax Appeals to determine the constitutionality of a statute on its face (*see, Matter of Unger*, Tax Appeals Tribunal, March 24, 1994)" (Determination, conclusion of law "K").

Petitioners disagree and argue that they are not challenging the facial validity of either section 620 or section 605(b)(1) (B). Rather, they argue that if they are taxable as residents of New York State and New York City, Tax Law § 605(b)(1)(B) is unconstitutional as applied to them because: a) they would be taxed more than once on their intangible income and this violates the Commerce Clause of the United States Constitution under the so-called "internal consistency test" and b) they would be taxed on their income from intangibles not employed in a New York business and this violates section 3 of Article XVI of the New York State Constitution.

The taxpayer bears the burden of proving that a statute, as applied, is unconstitutional. As we stated in *Matter of Brussel* (Tax Appeals Tribunal, June 25, 1992):

"it is well established that the taxpayer has the burden to establish that a statute is unconstitutional on its face (*see, Wiggins v. Town of Somers*, 4 NY2d 215, 173 NYS2d 579; *Maresca v. Cuomo*, 64 NY2d 242, 485 NYS2d 724, appeal dismissed 474 US 802; *Trump v. Chu*, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915). We can see no reason why this rule does not apply with equal force when a taxpayer is challenging the constitutionality of a statute as applied."

Section 620(a) of the Tax Law provides a credit against New York tax liability for income taxes paid to other states "upon income both derived therefrom and subject to tax under [the New York statute]." However, this credit only applies to income derived from sources within another jurisdiction and does not apply to income from intangibles except for income from intangibles employed in a business, trade or profession in the other jurisdiction (20 NYCRR 120.1[a], 120.4[d]; *see also, Matter of Mallinckrodt*, supra). According to petitioners, section 605(b)(1)(B) is not unconstitutional as applied to an individual who confines all of his or her activities to a single state, nor to an out-of-state

domiciliary who is also a resident of New York and who has only earned income rather than income from intangibles.

Multiple taxation of intangibles is not constitutionally prohibited. It is well settled that "there is no constitutional rule of immunity from taxation of intangibles by more than one State" (*Matter of State Tax Commn. of Utah v. Aldrich*, 316 US 174, 181). In *Curry v. McCanless* (307 US 357),the Supreme Court discussed the right of States to tax intangible assets:

"when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax. Whether we regard the right of a state to tax as founded on power over the object taxed . . . through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles. Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; and income may be taxed both by the state where it is earned and by the state of the recipient's domicile (*Curry v. McCanless*, supra, at 367-368)

Petitioners correctly point out that both *Aldrich* and *McCanless* concern whether multiple state taxation of intangibles violates a taxpayer's due process rights. Petitioners concede that the multiple taxation of intangibles

does not violate the Due Process Clause of the Constitution (Petitioners' reply brief, p. 15). Petitioners argue, however, that despite the fact that no violation of due process occurs, the taxation of income from intangibles by more than one State based on the residency of the petitioners violates the Commerce Clause.

The commerce clause of the Federal Constitution (Art 1, § 8, c 1.3) provides that Congress is vested with the power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

A state tax affecting interstate commercial activity violates the Commerce Clause unless it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (*Complete Auto Transit v. Brady*, 430 US 274, 279). "The first, and again obvious, component of fairness of an apportionment formula is what might be called internal consistency – that is the formula must be such that, if applied by every jurisdiction, it would result in no more than of all the unitary business's income being taxed" (*Container Corp. of America v. Franchise Tax Bd.*, 463 US 159, 169). It is the internal consistency component of the "fairness in apportionment" test which petitioners claim is violated by Tax Law § 605(b)(1)(B).

Before scrutinizing Tax Law § 605(b)(1)(B) under the Commerce Clause "tests," however, it is incumbent on petitioners to show that they are engaged in interstate commerce.

"Interstate commerce must be such as takes place between states, as differentiated from commerce wholly within a state. It must have reference to interstate trade or dealing; and if the regulation is not such, and comprehends only commerce which is internal, the state may legislate concerning it" (*Ware Leland v. Mobile County*, 209 US 405, 409).

As stated by the Supreme Court in *Goldberg v. Sweet* (488 US 252), "it is not a purpose of the Commerce Clause to protect state residents from their own state taxes" (*Goldberg v. Sweet*, supra, at 266).

The law review article relied on by petitioners ("Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, 91 Colum L Rev 119, 136) explores the possibility that "some states' tax structures may violate the commerce clause when applied to individuals whose interstate travel constitutes interstate commerce." However, applicability to the instant situation is premised on the author's unsupported conclusion that "if a taxpayer lives in one state and travels to work in another state, this travel probably involves interstate commerce" ("Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, supra, at 136, emphasis added). Petitioners have not shown how their domicile in New Jersey and their statutory residence in New York State constitutes interstate commerce. As a result, petitioners have not met their burden of proof to show that Tax Law § 605(h)(1)(B), as applied to them, is unconstitutional because it violates the Commerce Clause of the United States Constitution.

Further, petitioners have not demonstrated how their New York State residency pursuant to Tax Law § 605(b)(1)(B) violates the provisions of section 3 of Article XVI of the New York State Constitution. In applicable part, that section provides as follows:

"moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state . . . Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except

that the income therefrom may be taken into consideration in computing any excise tax measured by income generally."

Petitioners' argument is premised on "two propositions" which they assert "emerge" from the language and legislative history of Article XVI, section 3 of the State Constitution. First, the language of the section is rooted in the common law concept of domicile, and that domicile is the controlling factor for determining the taxability of intangibles and the income therefrom. Second, that based on the legislative history of Article XVI, section 3, "the protection afforded nondomiciliaries from taxation of their intangibles plainly extended beyond ad valorem taxes on intangible property and included other taxes relating to intangibles, notably taxes on the income therefrom" (Petitioners' brief, p. 50).

Petitioners assert that: "in light of these two propositions, the conclusion is inescapable that New York may not constitutionally apply its personal income tax to the taxpayers here who are not domiciliaries and whose intangibles are not employed in business in New York. The fact that Petitioners may satisfy the 183-day test for residency is beside the point" (Petitioners' brief, p. 51). Consequently, petitioners conclude that "inasmuch as the Division of Tax Appeals lacks the authority to apply the Tax Law in an ad hoc amended manner, and since this Tribunal is not authorized to extend the credit provided by Section 620(a) to taxes paid to other jurisdictions on income from intangibles, the only solution in this case is to find that Section 605(b)(1) is unconstitutional under the New York State Constitution as applied to Petitioners" (Petitioners' brief, p. 52).

We cannot agree. Petitioners do not explain how the taxation of residents on the income from intangibles is prohibited by Article XVI, section three. First, the plain language of the first sentence of the section merely provides that the situs of intangibles shall be deemed to be located at the domicile of the owner for purposes of taxation. It says nothing more. Petitioners' emphasis on the concept of

domicile as the controlling principle of permissible taxation under the section has no demonstrable basis in the history of the section. The Court of Appeals in *Ampco Printing-Advertisers, Offset Corp. v. City of New York* (14 NY2d 11, 247 NYS2d 865), had occasion to probe the history of Article XVI, section 3 in the context of allegations that the commercial rent occupancy tax levied by the City of New York violated the provision. As the Court stated:

"the Report of the Committee on Taxation which sponsored the provision at the convention discloses that it was designed to assure nonresidents that they could keep their money and securities [in New York] without any fear that the established legislative policy [of nontaxability] will be changed" (Journal and Documents, N.Y.S. Const. Conv., 1938, Doc. No. 2, p. 3), and Senator Saxe, the chairman of that committee, declared (2 Revised Record, N.Y.S. Const. Conv., 1938, pp. 1113-14): 'It is a further assurance to the people of the whole United States that if they send intangibles into the State of New York they are not going to be subjected to ad valorem taxation" (*Ampco Printing Advertisers' Offset Corp. v City of New York*, supra, 247 NYS2d 865, 873).

Second, with regard to the second sentence of the section, the *Ampco* Court went on to point out that:

"the [commercial rent and occupancy] tax does not apply to mere ownership or possession [of the intangible in New York...A statement made by Senator Saxe at the Constitutional Convention – in response to questions posed by another delegate – serves to illumine the purpose of proposed section 3 of article XVI. After noting that the provision would not bar imposition of a stock transfer tax (2 Revised Record, op cit., pp. 1114-15), Mr. Saxe went on to say (p. 1115): 'we want to make it impossible for the Legislature itself, or for the Legislature to delegate the right, to levy an excise tax on the mere possession of the property. In other words, the property may enjoy that privilege or it may be used for some purpose, and then you can levy an excise tax on it if and when it is used" (*Ampco Printing-*

Advertisers' Offset Corp. v. City of New York, supra, 247 supra, 247 NYS2d 865, 871).

There is no evidence in the record that intangibles of petitioners are being taxed due to their presence in this State nor is the tax on income earned from these intangibles an ad valorem tax on the intangibles themselves. Petitioners are being taxed not on the ownership of intangible assets but, as residents of the State of New York, on income generated by such intangible assets. Petitioners point to no authority that supports their extension of the language of Article XVI to income earned by nondomiciliary residents on such intangibles. Further, petitioners' reliance on the provisions of TSB-M-92 (October 9, 1992) issued by the Division's Technical Services Bureau is misplaced. That memorandum provides that non-residents are taxed only on New York source income and income from intangible personal property constitutes New York source income for such non-residents only to the extent that it is income from property employed in a business, trade, profession or occupation carried on in New York State. As a result, we deny petitioners' exception on this issue.

Penalty

The Division asserted penalties against petitioners under Tax Law § 685(b). That section imposes penalty when a tax deficiency is due to negligence or intentional disregard of the law. Petitioners bear the burden of proving that the deficiency was not due to negligence (Tax Law § 689[e]). The Administrative Law Judge concluded that petitioners did not meet their burden of proof. He stated:

"as noted in footnote '6', Mr. Tamagni's review of his tax returns before signing was unduly casual given his professional position, educational background and high income. Furthermore, petitioners have maintained a New York city apartment since 1980 or 1981 and, as noted in Finding of Fact '21' Mr. Tamagni was aware of the possibility of being treated as a statutory resident of New York if he spent more than 183 days in New York. Given

such knowledge, he should have maintained better documentation of his days in and out of New York. The fact that petitioners have prevailed at hearing with regard to a part of the period at issue does not alter this result. With better documentation, petitioners might have very well prevailed during the audit stage without the time and expense that both parties incurred from the need to conduct a formal hearing" (Determination, conclusion of law "L").

On exception, petitioners argue that they "clearly believed that they did not spend more than 183 days in New York during the years at issue, they were not negligent in either filing their New York returns as nonresidents or in the way they maintained proof of their whereabouts" (Petitioners' reply brief, p. 20). Their belief, however, is not sufficient to meet their burden of proof to show that their deficiency was not due to negligence. For the reasons stated by the Administrative Law Judge, we affirm his determination on this issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The exception of John S. and Janet B. Tamagni is denied;

3. The determination of the Administrative Law Judge is affirmed; and

4. The Notice of Deficiency dated July 6, 1992, as modified by the determination of the Administrative Law Judge, is sustained.

APPENDIX D

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition of

JOHN S. AND JANET B. TAMAGNI

for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1987 through 1989

DTA No. 811237;
TSB-D-95-(32)I;
Income Tax

August 25, 1994

DETERMINATION

Petitioners, John S. and Janet B. Tamagni, c/o Lazard Freres and Co., One Rockefeller Plaza, New York, New York 10020, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1987 through 1989.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 28, 1993 at 9:15 A.M., and continued to completion at the same location on September 29, 1993 at 8:30 A.M., with all briefs to be submitted by February 4, 1994. Petitioners' brief was received on December 6, 1993. The answering brief of the Division of Taxation was received on January 12, 1994, and petitioners' reply brief on August 2, 1994.[1] Petitioners appeared by Morrison & Foerster, Esqs.

[1] By a letter dated July 27, 1994, the Administrative Law Judge requested that petitioners submit another copy of their reply brief since it appeared

(Footnote Continued on Following Page)

(Arthur R. Rosen, Esq., Craig B. Fields, Esq., and Judith E. Lansky, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donna M. Gardiner, Esq., of counsel).

ISSUES

I. Whether petitioners have established that they were not present in New York State and City for more than 183 days during each of the years at issue and therefore were not taxable as resident individuals pursuant to Tax Law § 6O5(b)(1)(B) and New York City Administrative Code §11-1705(b)(1)(B).

II. Whether, if petitioners were taxable as nonresidents only, the Division of Taxation may amend its answer to assert that additional tax would still be due based upon an increase in the allocation to New York of the partnership income of Lazard Freres and Co., of which petitioner John S. Tamagni was a partner.

III. Whether, if petitioners were properly taxable as resident individuals pursuant to Tax Law §605(b)(1)(B) because they were present in New York for more than 183 days during each of the years at issue, such statutory provision is unconstitutional as applied to petitioners under the so-called "internal consistency test" because they would be taxed more than once on their intangible income.

IV. Whether, if petitioners were properly taxable as resident individuals pursuant to Tax Law §605(b)(1)(B) because they were present in New York for more than 183 days during each of the years at issue, such statutory provision as applied to petitioners violates Section 3 of Article XVI of the New

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that a transmittal letter dated February 2, 1994 indicating that a reply brief was enclosed, in addition to proposed findings of fact and conclusions of law, transmitted only the proposed findings of fact and conclusions of law.

York State Constitution by taxing their income from intangibles not employed in a New York business.

V. Whether petitioners have established that negligence penalties should be abated.

VI. Whether the submission of personal notes of petitioners' representative to show that the transcript was in error after the completion of the hearing was improper.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued three statements of audit changes each dated March 3, 1992 against petitioners, John S. and Janet B. Tamagni, showing income tax due of $64,115.51 plus penalty [2] and interest for 1987, $70,353.28 plus penalty and interest for 1988, and $58,072.43 plus penalty and interest for 1989, respectively.

The statement for 1987 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return		$1,880,952.00
Audit increases to N.Y. State income		
Interest income	$97,460.00	
Dividend income	34,488.00	
New York additions	23,698.00	
Audit decreases to N.Y. State income		
Rents & royalties	19,170.00	
Partnerships	31,616.00	
New York subtractions	20,847.00	
Net adjustments to N.Y. State income		84,013.00
Corrected adjusted gross income		$1,964,965.00
Less: Itemized deductions per return		220,468.00
Four exemptions		3,600.00
Corrected N.Y. State taxable income		$1,740,897.00

[2] The Division asserted negligence penalties under Tax Law §685(b) for each of the three years at issue.

[3] During 1988 and 1989, "Rents and royalties were included in the item "Partnerships and S corporations" listed next in the table above.

The 1987 statement showed a "corrected tax liability" of $150,695.74 for New York State income tax and of $70,688.77 for New York City income tax and "additional tax liability" of $6,512.74 for New York State income tax and of $57,602.77 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of $144,183.00 and $13,086.00, respectively).

The statement for 1988 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return		$2,181,112.00
Audit increases to N.Y. State income		
Interest income	$39,647.00	
Dividends	37,606.00	
Partnerships	24,674.00	
New York additions	161,853.00	
Audit decreases to N.Y. State income		
Capital gains	40,600.00	
Other losses	141.00	
New York subtractions	91,120.00	
Net adjustments to N.Y. State income		131,919.00
Corrected adjusted gross income		$2,313,031.00
Less: Itemized deductions per return		228,991.00
N.Y. itemized deduction adjustment		45,798.20
Corrected itemized deductions after modification		$183,192.80
Two exemptions		2,000.00

Corrected N.Y. State taxable income	$2,127,838.20

The 1988 statement showed a "corrected tax liability" of $177,334.95 for New York State income tax and of $74,029.33 for New York City income tax and "additional tax liability" of $10,320.95 for New York State income tax and of $60,032.33 for New York City income tax (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of $167,014.00 and $13,997.00, respectively).

The statement for 1989 showed the following calculation for "corrected N.Y. State taxable income":

N.Y. State adjusted gross income per return		$1,877,063.00
Audit increases to N.Y. State income		
Interest income	$31,665.00	
Dividend income	48,088.00	
Capital gain income	47,356.00	
New York additions	127,839.00	
Audit decreases to N.Y. State income		
Taxable refunds	21,989.00	
Partnerships	105,371.00	
New York subtractions	78,768.00	
Net adjustments to N.Y. State income		48,820.00
Corrected adjusted gross income		$1,925,883.00
Less: Itemized deductions per return		231,909.00
N.Y. itemized deduction adjustment		115,954.50

Corrected itemized deductions after modification	$115,954.50
Two exemptions	2,000.00
Corrected N.Y. State taxable income	$1,807,928.50

The 1989 statement showed a "corrected tax liability" of $141,656.87 for New York State income tax and of $61,141.56 for New York City income tax and "additional tax liability" of $7,733.87 for New York State income tax and of $50,338.56 (after crediting petitioners for New York State income tax and New York City nonresident earnings tax previously paid of $133,923.00 and $10,803.00, respectively).

In sum, the three statements of audit changes assert the following tax liabilities against petitioners:

	1987	1988
New York State income tax	$6,512.74	$10,320.95
New York City income tax	57,602.77	60,032.33
Totals	$64,115.51	$70,353.28

	1989	Total
New York State income tax	$7,733.87	$24,567.56
New York City income tax	50,338.56	167,973.66
Totals	$58,072.43	$192,541.22

It is observed that the total for additional New York City income tax asserted as due of $167,973.66 represents 87% of the total tax asserted as due against petitioners.

2. The Statement of Audit Changes for 1987 included the following explanation:

"The taxpayers maintained a permanent place of abode in New York City. The taxpayers did not submit adequate records to establish that they spent less than 184 days in New York State & City. Accordingly, we hold the taxpayers as residents of New York State & City. We impose negigence [sic] penalties for failure to establish that there was reasonable cause for the understatement of taxes due."

The statements of audit changes for 1988 and 1989 also included the same explanation as noted above. In addition, the statement for 1988 noted:

"Per audit of Lazard Freres & Co., the New York State allocation has been changed. Partnership income has been increased by $31,010.00. Dividend income has been decreased by $5,357.00."

3. The Division then issued a Notice of Deficiency dated July 6, 1992 against petitioners for 1987, 1988 and 1989 showing total income tax due for the three years of $192,541.22, plus penalty and interest. The Notice of Deficiency showed a breakdown of this total which corresponded to the amounts for each of the years noted in Finding of Fact "1". The notice explained that the tax asserted as due was "[b]iased on an audit."

Petitioners' Tax Returns

4. For each of the years at issue, petitioners filed a New York State Nonresident Income Tax Return (Form IT-203) checking the filing status of "married filing joint return". For the years at issue, petitioners reported their income, with allocations to New York State, as follows:

	1987 Federal Amount	1987 NYS Amount
Wages & salaries	$ 0	0
Taxable interest income	124,734	78,567
Dividend income	78,432	43,944
Taxable refund of State and local Taxes	105,383	105,383
Capital gain or (loss)	-3,000	-3,000
Other gains or losses	0	0
Rents and Royalties [3]	19,170	0
Partnerships and S corporations	1,682,216	1,713,832
Other income	0	0
Total	1,968,595	$1,938,726

	1988 Federal Amount	1988 NYS Amount
Wages & salaries	$ 0	0
Taxable interest income	120,203	31,785
Dividend income	185,099	147,493
Taxable refund of State and local Taxes	24,728	0
Capital gain or (loss)	-3,000	37,600
Other gains or losses	141	0
Rents and Royalties [3]		
Partnerships and S corporations	1,997,611	1,972,937
Other income	0	0
Total	2,324,500	21,189,815

	1989	
	Federal Amount	NYS Amount
Wages & Salaries	$ 0	0
Taxable interest income	130,545	35,235
Dividend income	195,314	147,226
Taxable refund of State and local taxes	45,023	21,989
Capital-gain or (loss)	52,116	4,760
Other gains or losses	0	0
Rents and royalties[3]		
Partnerships and S corporations	1,571,484	1,676,855
Other income	339	339
Total	$1,985,480	$1,877,063

These tax returns were signed by both petitioners. It is further observed that the returns do not disclose the name of any paid preparer.[4]

5. Petitioners' tax returns were complex reports due to their involvement in 14 different partnerships and one subchapter S corporation, in addition to various transactions which produced capital gains and losses. Nonetheless, the source of most of petitioners' income was the partnership, Lazard Freres & Co., which passed on to petitioner John S. Tamagni the following items of income and loss:

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[3] During 1988 and 1989, "Rents and royalties were included in the item "Partnerships and S Corporations" listed next in the table above.

[4] Mr. Tamagni testified that the returns were prepared by the tax department at Lazard Freres (tr., p. 247).

1987

Loss	Income
$9,606.00	$2,011,685.00

1987

Loss	Income
$21,117.00	$8,162.00

1988

Loss	Income
$0	$2,255,131.00

1989

Loss	Passive Income	Non-Passive Income
$1,693,107.00		

6. Mr. Tamagni also filed a City of New York Nonresident Earnings Tax Return (Form NYC-203) for each of the years at issue reporting net earnings from his self-employment as a partner in Lazard Freres & Co. located at 1 Rockefeller Plaza in midtown Manhattan as follows:

1987	1988	1989
$2,013,290.00	$2,153,410.00	$1,662,060.00

7. The City of New York nonresident earnings tax returns each included the following question:

"Did you or your spouse maintain an apartment or other living quarters in the city of New York during any part of the

year? If Yes,[5] give address below and number of days spent in the City of New York during [the particular year]."

For 1987, Mr. Tamagni answered "No" to this question.6 For 1988, he responded "Yes", noting an eastside Manhattan address of 29 East 64th Street and 131 days spent in New York City during 1988. For 1989, Mr. Tamagni also responded "Yes", noting the 29 East 64th Street address and 148 days spent in New York City during 1989.

8. As of the hearing date, Mr. Tamagni had been associated with Lazard Freres as an investment banker for 21 years. He described his position as follows:

"I'm a partner in the municipal finance operation of Lazard Freres and the functions of that department and my own activities within it are to assist state and local government financing infrastructure or other capital needs" (tr., p. 46).

His duties require considerable travel throughout the United States.

The Audit

9. The Division offered the testimony of its auditor, Richard Hayes, who first contacted the taxpayers by his letter dated May 9, 1991 mailed to petitioners "c/o Lazard, 1 Rockefeller Plaza, New York, NY 10020", which was the address used by them on their tax returns described above. Mr. Hayes scheduled an appointment at 10:00 A.M. on June 6, 1991 at his office and requested that petitioners:

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[5] The 1987 return did not include the words "If Yes".

[6] Mr. Tamagni testified that he erred in responding "No." He explained that he did not look at every line of his tax returns: "I basically look at the major items and the taxes that I owe" (tr., p. 248).

"Please have available for examination copies of Federal and State income tax returns, supporting schedules, all books, records, worksheets and other documents pertinent to the preparation of your income tax returns.

"Brokerage, savings and checking statements (including cancelled checks, stubs and statements from January 1, 1987 through 12/31/89) [were also requested]."

In addition, Mr. Hayes enclosed a questionnaire that:

"asks taxpayers certain questions regarding which type of business he is employed in. Does he have a place in New York State. If so, when were the living quarters maintained. Is it an apartment, a co-op, a house[?] The number of days spent in New York State for work purposes. Number of dates spent on nonworking days, including holidays, weekends days [sic], sick day[s]....." (tr., p. 277).

10. Petitioners' former representative, Charles Stieglitz, responded to the auditor's initial letter and arranged a meeting for June 20, 1991. At the meeting, the auditor examined documents pertaining to the allocation to New York of interest, dividends, capital gains and partnership distributions. However, no records were then provided concerning days spent "in and out of New York State" (tr., p. 274). Mr. Hayes informed Mr. Stieglitz that he "needed to see records to support the number of days the taxpayers spent in New York State" (tr., pp. 276-277), and he gave the former representative a list of documents that he wanted to review:

"[d]iaries, expense reports, credit card statements and slips, bank statements, cancelled checks, phone bills, utility bills [and apparently another copy of the questionnaire described in Finding of Fact "9"]" (tr., p. 277).

The auditor did not- receive many of the documents requested:

"At the subsequent meeting or meetings[7] I received for examination taxpayer's diaries. Expense reports but only the cover sheet of the expense report. There was [sic] no supporting receipts . . . .

* * *

"I received some American Express statements and slips for the period May 1988 through the end of 1989. [8] I did not receive any bank statements. I did not receive any cancelled checks. I did not receive any telephone bills for New York, New Jersey, New Hampshire places of abode of the taxpayer. I did not receive utility bills for the New York/New Jersey home, their places of abode, and I did not receive the audit questionnaire" (tr., pp. 279-280).

It is unknown why petitioners did not introduce into the record similar statements for the entire period mentioned by the auditor.

11. Mr. Hayes disagreed with the position of attorney Arthur Rosen, petitioners' current representative, expressed

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[7] The record discloses a subsequent meeting on February 20, 1992 attended by petitioners' current representatives and the auditor.

[8] Included in petitioners' Exhibit "10" are photocopies of the first pages of American Express statements, each one a "Summary of Corporate Card Account" which was in the name of "John S. Tamagni, Lazard Freres Co.", as follows:

Statement of Closing Date	Total Charges
7/15/88	$2,941.21
8/16/88	1,314.24
9/15/88	1,031.24
10/14/88	976.60
11/14/88	1,438.49
1/14/89	920.87

at a meeting on February 20, 1992 that diaries were sufficient to establish days in and out of New York. According to Mr. Hayes, Mr. Rosen explained that he would protest any assessment and, as noted by the auditor in his log (Division's Ex. "N", p. 8), "would have witnesses and statements [at the formal hearing] showing the taxpayers are not residents of N.Y." By a letter dated March 3, 1992, Mr. Hayes wrote Mr. Rosen reiterating his position that "adequate records to substantiate that the taxpayers were not in New York State more than 183 days were not submitted for any of the years under examination."

12. The record does note disclose whether the Division was given a reason during the audit why petitioners did not or could not produce the various documents requested by Mr. Hayes. At the hearing, Mr. Tamagni explained that he and his wife did not keep their telephone bills: "After they were paid, they were discarded" (tr. p. 200). Nor did petitioners keep their utility bills for either their New Jersey home or New York City apartment once they had been paid. Mr. Tamagni testified that he was unaware that the auditor had requested all of petitioners' cancelled checks, but would have provided them if he "had been asked" (tr., p. 201). Like the telephone and utility bills, Mr. Tamagni indicated that he and his wife did not keep "our personal credit card bills and invoices. After paying them we discarded them" (tr., p. 202).

Furthermore, Mr. Tamagni testified that he was not required "to attach receipts to substantiate expenses" (tr, p. 202) for purposes of his expense reports at Lazard Freres. As a result, petitioners' Exhibits "9", "10" and "11", which are photocopies of Mr. Tamagni's expense reports for his travel expenses incurred in his work on behalf of Lazard Freres & Co., do not include receipts. For example, a report dated March 5, 1987 included in Exhibit "9" shows total travel and entertainment expenses of $2,160.35. Travel expenses were itemized but no receipts were attached:

Date	Place Visited	Transportation	Hotel	Total Expense
1/15/87	Phoenix, AZ	Avis - $47.72	$186.01	$233.73
1/15/87	San Francisco, CA	Air - $219.00	194.60	413.61
	San Francisco, CA	Air - $28.00		
1/16/87	(Alon Kasha)	Air - $28.00		56.00
1/19-20/87	Madison, WI	Air - $496.00	78.40	574.40
1/21/87	Boston, MA	Air - $119.00	197.64	316.64
				$1,594.38

Similarly, entertainment expenses were itemized but no receipts were attached:

Date	Place of Entertainment	Name of Person Entertained	Amount
1/7/87	21 Club	R. Locke – E.F. Hutton	$ 92.94
12/31/86	21 Club	B. Weintrob – Port Authority	106.22
1/12/87	The Sea Grill	W. Watt, M. DelGiudice	186.61
1/14/87	Charley O's	M. DelGiudice	16.65
2/2/87	American Festival	W. Watt	48.38
2/3/87	Ecco	Allan Haack - Port Authority	68.80
2/9/87	Charley O's	W. Watt	46.37
			$565.97

It is observed that travel expenses of $1,594.38, plus entertainment expenses of $565.97, equals $2,160.35, the amount Mr. Tamagni claimed on his expense report.

Stipulations

13. The parties executed an undated stipulation, marked into the record as petitioners' Exhibit "1", which provided that petitioners were not domiciled in New York during the years at issue. Rather, petitioners were domiciliaries of New Jersey, where they have resided at 55 Oxbow Lane, Summit, New Jersey for the past 14 years. The parties also executed a second stipulation, marked into the record as petitioners' Exhibit "2", whereby they agreed that petitioners were not present in New York for 33 days in 1987, 31 days in 1988 and 42 days in 1988. The Division did not view the diaries as sufficient substantiation of petitioners' whereabouts which resulted in it stipulating to petitioner' presence outside of New York only for these limited number of days. Mr. Hayes testified as follows:

"[The diaries] were acceptable but they are not sufficient because it is Audit's position or policy to try and ascertain from third party records or other statements such as the American Express, airplane tickets, hotel bills to show that a taxpayer actually did spend time out of New York State" (tr., p. 293).

In particular, the auditor noted that, for many days, the diaries were blank and he could not verify a blank page.

Petitioners' Proof

14. Petitioners offered the testimony of Angela Musalo, an employee of Lazard Freres, who was John Tamagni's executive secretary for the past 20 years in the Municipal Finance Department at Lazard Freres. Petitioners introduced into evidence as their Exhibits "3", "4" and "5" hard covered and bound diaries for 1987, 1988 and 1989 which Ms. Musalo kept for Mr. Tamagni. She described how she maintained the diaries as follows:

"Well, if Mr. Tamagni had appointments for the day, I would record them. Any travel plans that he made, I would

record in the diary with the time of his leaving New York or whatever city he was visiting" (tr., p. 23).

A close review of the diaries discloses that Ms. Musalo also recorded some personal appointments for Mr. Tamagni. For example, for Monday, June 15, 1987, there is a notation "30th Dartmouth College Reunion" and for Wednesday, August 12, 1987 there is an entry showing a theater date in the evening. However, Ms. Musalo testified that she did not "as a general rule, record [Mr. Tamagni's] personal appointments in [her] diary" and that "only when he was in New Hampshire" did she record Mr. Tamagni's weekend activities (tr., p. 26). On cross-examination, she noted that Lazard Freres had a policy requiring all partners to be available on weekends and that "one of the secretaries [would] type up a schedule of all the partners, where they will be for that particular weekend" (tr., p. 32). She added that one of the partners of the firm had the schedules. However, petitioners did not introduce them into evidence.

Ms. Musalo also testified (in response to leading questions on direct examination) that, as a general practice, if Mr. Tamagni had a morning airline flight, he did not come into the office and, similarly, if his return flight arrived after 3:30 P.M., "he usually went home" (tr., p. 29; emphasis added).

John Tamagni's Testimony

15. The transcript of the hearing in this matter consists of 331 pages, of which Mr. Tamagni's testimony constituted over 200 pages. Using Ms. Musalo's diaries, as described in Finding of Fact "14", and his own diaries, which are hardbound engagement books, Mr. Tamagni testified as to

days during the three years at issue when he was not present in New York State/City.[9]

Mr. Tamagni's testimony followed a certain pattern. On Saturdays and Sundays, unless the diaries specifically noted that he was in New York City, Mr. Tamagni testified: "It's my practice to spend my weekends with my wife at home" (tr., p. 77). This response was repeated frequently by the witness with regard to questioning concerning his whereabouts on the weekends. Mr. Tamagni traveled frequently on business trips and since the diaries noted his business trips, he used them to establish other days that he was not present in New York. In addition, he took several vacations which were also noted in the diaries and these too were counted as days that he was not present in New York State/City.

Mr. Tamagni testified that, during the respective months of 1987, he was not in New York on the following days:[10]

January 1987

Thurs., 1 – Summit, N.J.
Fri., 2 – Summit, N.J.
Sat., 3 – Summit, N.J.
Sun., 4 – Summit, N.J.
Sat., 10 – Summit, N.J.
Sun., 11 – Summit, N.J.
Thurs., 15 – Outside New York per stipulation
Fri., 16 – San Francisco
Sat., 17 – Summit, N.J.

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[9] Occasionally, Mr. Tamagni pointed out days that he was in New York State, but not in New York City.

[10] As noted in Finding of Fact "13", the Division stipulated that petitioners were not present in New York for 33 days in 1987, 31 days in 1988 and 42 days in 1989. The particular days are included in the count of days petitioners were outside New York in the analysis of Mr. Tamagni's testimony in this Finding of Fact, and such days are referenced by the notation "per stipulation."

Sun., 18 – Summit, N.J.
Mon., 19 – Madison, Wisconsin
Tues., 20 – Outside New York per stipulation
Wed., 21 – Outside New York per stipulation
Sat., 24 – New Jersey
Sun., 25 – New Jersey
Thurs., 29 – Cleveland
Sat., 31 – New Jersey

Total: 17 days outside New York State/City

February 1987

Sun., 1 – Summit, N.J.
Sat., 7 – Summit, N.J.
Sun., 8 – Summit, N.J.
Wed., 11 – New Hampshire[11]
Thurs., 12 – New Hampshire
Fri., 13 – New Hampshire
Sat., 14 – New Hampshire
Sun., 15 – New Hampshire
Mon., 16 – New Hampshire
Tues., 17 – Summit, N.J.
Wed., 18 – Seattle
Thurs., 19 – Seattle to Summit, N.J.
Sat., 21 – Summit, N.J.
Sun., 22 – Summit, N.J.
Thurs., 26 – Boston
Sat., 28 – Summit, N.J.

Total: 16 days outside New York State/City

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[11] Since 1984, petitioners have owned a vacation home in Grantham, New Hampshire which they use in the summer, fall and winter and rarely in the "kind of muddy" spring (tr., p. 69).

March 1987

Sun., 1 – Summit, N.J.
Sat., 7 – Summit, N.J.
Sun., 8 – Summit, N.J.
Sat., 14 – Summit, N.J.
Sun., 15 – Summit, N.J.
Mon., 16 – Columbia, South Carolina
Tues., 17 – Outside New York per stipulation
Wed., 18 – Outside New York per stipulation
Thurs., 19 – Outside New York per stipulation
Sat., 21 – Summit, N.J.
Sun., 22 – Summit, N.J.
Tues., 24 – Orlando, Florida
Wed., 25 – Springfield, Missouri
Sat., 28 – Summit, N.J.
Sun., 29 – Summit, N.J.

Total: 15 days outside New York State/City

April 1987

Fri., 3 – Outside New York per stipulation
Sat., 4 – Outside New York per stipulation
Sun., 5 – Outside New York per stipulation
Mon., 6 – San Francisco to Summit, N.J.
Fri., 10 – Grand Rapids, Michigan to Richmond, Virginia
Sat., 11 – Richmond
Sun., 12 – Richmond to Summit, N.J.
Mon., 13 – Santa Fe, New Mexico
Tues., 14 – Santa Fe
Fri., 17 (Good Fri.) – Summit, N.J.
Sat., 18 – Summit, N.J.
Sun., 19 (Easter) – Summit, N.J.
Tues., 21 – Cleveland
Wed., 22 – Sacramento
Sat., 25 – Summit, N.J.
Sun., 26 – Summit, N.J.
Tues., 28 – Washington, D.C.

Total: 17 days outside New York State/City

May 1987

Sat., 2 – Summit, N.J.
Sun., 3 – Summit, N.J.
Sat., 9 – Summit, N.J.
Sun., 10 – Summit, N.J.
Fri., 15 – Paris, France
Sat., 16 – Outside New York per stipulation
Sun., 17 – Outside New York per stipulation
Mon., 18 – Outside New York per stipulation
Tues., 19 – Outside New York per stipulation
Wed., 20 – Outside New York per stipulation
Thurs., 21 – Outside New York per stipulation
Fri., 22 – Outside New York per stipulation
Sat., 23 – Outside New York per stipulation
Sun., 24 – Outside New York per stipulation

Mon., 25 – Outside New York per stipulation
Tues., 26 – Outside New York per stipulation
Wed., 27 – Outside New York per stipulation
Thurs., 28 – Outside New York per stipulation
Fri., 29 – Outside New York per stipulation
Sat., 30 – Summit, N.J.
Sun., 31 – Summit, N.J.

Total: 21 days outside New York State/City

June 1987

Mon., 1 – Albany, New York
Sat., 6 – Summit, N.J.
Sun., 7 – Summit, N.J.
Wed., 10 – Boston
Fri., 12 – New Hampshire
Sat., 13 – New Hampshire
Sun., 14 – New Hampshire
Mon., 15 – New Hampshire
Tues., 16 – New Hampshire
Wed., 17 – New Hampshire
Fri., 19 – New Hampshire
Sat., 20 – New Hampshire
Sun., 21 – New Hampshire to Summit, N.J.
Sat., 27 – Summit, N.J.
Sun., 28 – Summit, N.J.

Total: 15 days outside New York City
14 days outside New York State

July 1987

Wed., 1 – Helena, Montana
Fri., 3 – New Hampshire
Sat., 4 – New Hampshire
Sun., 5 – New Hampshire

Mon., 6 – New Hampshire
Wed., 8 – Outside New York per stipulation
Sat., 11 – Summit, N.J.
Sun., 12 – Summit, N.J.
Sat., 18 – Summit, N.J.
Sun., 19 – Summit, N.J.
Sat., 25 – Summit, N.J.
Sun., 26 – Summit, N.J.
Thurs., 30 – San Francisco
Fri., 31 – New Hampshire

Total: 14 days outside New York State/City

August 1987

Sat., 1 – New Hampshire
Sun., 2 – New Hampshire
Mon., 3 – New Hampshire
Tues., 4 – New Hampshire
Sat., 8 – Summit, N.J.
Sun., 9 – Summit, N.J.
Sat., 15 – Summit, N.J.
Sun., 16 – Summit, N.J.
Tues., 18 – Boston[12]
Thurs., 20 – Outside New York per stipulation
Sat., 22 – Summit, N.J.
Sun., 23 – Summit, N.J.
Mon., 24 – Summit, N.J. and South Carolina
Sat., 29 – Summit, N.J.
Sun., 30 – Summit, N.J.

Total: 15 days outside New York State/City

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[12] Mr. Tamagni testified that he was in Boston on August 17, 1987 (tr., p. 101). However, the diaries indicate he was in Boston on August 18, 1987.

September 1987

Thurs., 3 – New Hampshire
Fri., 4 – Outside New York per stipulation
Sat., 5 – Outside New York per stipulation
Sun., 6 – Outside New York per stipulation
Mon., 7 – Outside New York per stipulation
Tues., 8 – New Hampshire and Summit, N.J.
Sat., 12 – Summit, N.J.
Sun., 13 – Summit, N.J.
Thurs., 17 – Baton Rouge, Louisiana and Summit, N.J.
Sat., 19 – Summit, N.J.
Sun., 20 – Summit, N.J.
Wed., 23 – Boston
Sat., 26 – Summit, N.J.
Sun., 27 – Summit, N.J.
Wed., 30 – Philadelphia and Boston

Total: 15 days outside New York State/City

October 1987

Sat., 3 – Summit, N.J. or Boston
Sun., 4 – Summit, N.J. or Boston
Thurs., 8 – Washington, D.C. and Cincinnati
Fri., 9 – Cincinnati and Summit, N.J.
Sat., 10 – Summit, N.J.
Sun., 11 – Summit, N.J.
Tues., 13 – Boston and Summit, N.J.
Sat., 17 – Summit, N.J.
Sun., 18 – Summit, N.J.
Fri., 23 – Boston
Sat., 24 – Theater in New York City[13]

[13] Weekend days on which Mr. Tamagni specified he was in New York City are included in these schedules because such testimony is critical to the resolution of this matter as noted in the Conclusions of Law.

Sun., 25 – Summit, N.J.
Wed., 28 – Los Angeles
Thurs., 29 – Outside New York per stipulation
Sat., 31 – Summit, N.J.

Total: 14 days outside New York State/City

November 1987

Sun., 1 – Summit, N.J.
Wed., 4 – San Francisco
Thurs., 5 – Outside New York per stipulation
Sat., 7 – Summit, N.J.
Sun., 8 – Summit, N.J.
Mon., 9 – South Carolina
Tues., 10 – Lakewood, New Jersey
Fri., 13 – Outside New York per stipulation
Sat., 14 – Richmond, Virginia
Sun., 15 – Richmond, Virginia
Thurs., 19 – Phoenix, Arizona and Summit, N.J.
Sat., 21 – Summit, N.J.
Sun., 22 – Summit, N.J.
Thurs., 26 – Summit, N.J.
Fri., 27 – Summit, N.J.
Sat., 28 – Summit, N.J.
Sun., 29 – Summit, N.J.

Total: 17 days outside New York State/City

December 1987

Tues., 1 – San Francisco
Fri., 4 – Summit, N.J. to Mineola, Nassau County
Sat., 5 – Summit, N.J.
Sun., 6 – Summit, N.J.
Thurs., 10 – Outside New York per stipulation

Fri., 11 – Summit, N.J. to North Hempstead, Nassau County
Sat., 12 – Summit, N.J.
Sun., 13 – Summit, N.J.
Fri., 18 – Summit, N.J. to Mineola, Nassau County
Sat., 19 – Summit, N.J.
Sun., 20 – Summit, N.J.
Fri., 25 – Summit, N.J.
Sat., 26 – Summit, N.J.
Sun., 27 – Summit, N.J.
Mon., 28 – Summit, N.J.
Wed., 30 – Summit, N.J. to San Francisco
Thurs., 31 – San Francisco

Total: 17 days outside New York City
14 days outside New York State

These 1987 monthly totals add up to 193 days outside New York City and 189 days outside New York State for the year, or 172 days present in New York City and 176 days present in New York State.

January 1988

Fri., 1 – San Francisco
Sat., 2 – San Francisco and Summit, N.J.
Sun., 3 – Summit, N.J.
Fri., 8 – Mineola, Nassau County
Sat., 9 – Summit, N.J.
Sun., 10 – Summit, N.J.
Fri., 15 – New Hampshire
Sat., 16 – Outside New York per stipulation
Sun., 17 – Outside New York per stipulation
Mon., 18 – New Hampshire to Summit, N.J.
Thurs., 21 – Phoenix, Arizona
Sat., 23 – Summit, N.J.
Sun., 24 – Summit, N.J.
Wed., 27 – Phoenix, Arizona
Sat., 30 – Summit, N.J.
Sun., 31 – Summit, N.J.

Total: 16 days outside New York City
15 days outside New York State

February 1988

Mon., 1 – Phoenix, Arizona to Summit, N.J.
Sat., 6 – Summit, N.J.
Sun., 7 – Summit, N.J.
Sat., 13 – Summit, N.J.
Sun., 14 – Summit, N.J.
Mon., 15 – Summit, N.J.
Sat., 20 – Summit, N.J.
Sun., 21 – Summit, N.J.
Wed., 24 – Washington, D.C.
Sat., 27 – Summit, N.J.
Sun., 28 – Summit, N.J.

Total: 11 days outside New York State/City

March 1988

Sat., 5 – Summit, N.J.
Sun., 6 – Summit, N.J.
Thurs., 10 – Newark, N.J.
Sat., 12 – Summit, N.J.
Sun., 13 – Summit, N.J.
Tues., 15 – Harrisburg, Pennsylvania
Fri., 18 – Washington, D.C. to Mineola, Nassau County
Sat., 19 – Summit, N.J.
Sun., 20 – Summit, N.J.
Sat., 26 – Summit, N.J.
Sun., 27 – Summit, N.J., but dinner in NYC
Thurs., 31 – San Francisco

Total: 11 days outside New York City
10 days outside New York State

April 1988

Fri., 1 – Summit, N.J.
Sat., 2 – Summit, N.J.
Sun., 3 – Summit, N.J.
Thurs., 7 – Nashua, New Hampshire
Sat., 9 – Summit, N.J.
Sun., 10 – Summit, N.J.
Wed., 13 – Summit, N.J. to Phoenix, Arizona
Thurs., 14 – Outside New York per stipulation
Fri., 15 – Phoenix to Summit, N.J.
Sat., 16 – Summit, N.J.
Sun., 17 – Summit, N.J.
Sat., 23 – Summit, N.J.
Sun., 24 – Summit, N.J. to Charleston, South Carolina
Mon., 25 – Charleston to Summit, N.J.
Fri., 29 – New Hampshire
Sat., 30 – New Hampshire

Total: 16 days outside New York State/City

May 1988

Sun., 1 – New Hampshire
Mon., 2 – New Hampshire
Wed., 4 – Seattle
Sat., 7 – Greenwich, Connecticut and Summit, N.J.
Sun., 8 – Greenwich, Connecticut and Summit, N.J.
Mon., 9 – Newark, N.J.
Sat., 14 – Summit, N.J.
Sun., 15 – Summit, N.J.
Wed., 18 – Summit, N.J. to Los Angeles
Thurs., 19 – Outside New York per stipulation
Fri., 20 – Outside New York per stipulation
Sat., 21 – Outside New York per stipulation
Sun., 22 – Outside New York per stipulation
Mon., 23 – Bermuda
Sat., 28 – Summit, N.J.
Sun., 29 – Summit, N.J.
Mon., 30 – Summit, N.J.

Total: 17 days outside New York State/City

June 1988

Fri., 3 – Nashua, New Hampshire
Sat., 4 – Summit, N.J.
Sun., 5 – Summit, N.J.
Mon., 6 – Phoenix, Arizona
Fri., 10 – New Hampshire
Sat., 11 – Outside New York per stipulation
Sun., 12 – New Hampshire
Mon., 13 – New Hampshire
Sat., 18 – New York City – departmental meeting
Sun., 19 – Summit, N.J.
Sat., 25 – Summit, N.J.
Sun., 26 – Summit, N.J. to Seattle
Mon., 27 – Seattle
Tues., 28 – Seattle to Summit, N.J.

Total: 13 days outside New York State/City

July 1988

Fri., 1 – New Hampshire
Sat., 2 – Outside New York per stipulation
Sun., 3 – Outside New York per stipulation
Mon., 4 – Outside New York per stipulation
Tues., 5 – New Hampshire to Summit, N.J.
Sat., 9 – Summit, N.J.
Sun., 10 – Summit, N.J.
Wed., 13 – Outside New York per stipulation
Thurs., 14 – Cleveland, Ohio to Summit, N.J.
Fri., 15 – Summit, N.J. to New Hampshire
Sat., 16 – Outside New York per stipulation
Sun., 17 – Outside New York per stipulation
Mon., 18 – New Hampshire
Sat., 23 – Summit, N.J.
Sun., 24 – Summit, N.J.
Sat., 30 – New Hampshire
Sun., 31 – New Hampshire

Total: 17 days outside New York State/City

August 1988

Mon., 1 – New Hampshire
Tues., 2 – New Hampshire
Wed., 3 – New Hampshire to Summit, N.J.
Fri., 5 – Outside New York per stipulation
Sat., 6 – Outside New York per stipulation
Sun., 7 – Outside New York per stipulation
Mon., 8 – Outside New York per stipulation
Tues., 9 – Outside New York per stipulation
Wed., 10 – San Francisco to Summit, N.J.
Sat., 13 – Summit, N.J.
Sun., 14 – Summit, N.J.
Sat., 20 – Summit, N.J.
Sun., 21 – Summit, N.J.
Sat., 27 – Summit, N.J.

Sun., 28 – Summit, N.J.
Mon., 29 – [Washington, D.C.][14]
Tues., 30 – Summit, N.J. to Omaha, Nebraska
Wed., 31 – [Omaha, Nebraska to Newark, N.J.][15]

Total: 16 days outside New York State/City
(not counting the 29th and 31st)

September 1988

Thurs., 1 – Summit, N.J. to New Hampshire
Fri., 2 – Outside New York per stipulation
Sat., 3 – Outside New York per stipulation
Sun., 4 – Outside New York per stipulation
Mon., 5 – New Hampshire
Sat., 10 – Summit, N.J.
Sun., 11 – Summit, N.J.
Wed., 14 – Outside New York per stipulation
Thurs., 15 – Seattle to Summit, N.J.
Sat., 17 – Summit, N.J.
Sun., 18 – Summit, N.J.
Thurs., 22 – Hartford, Connecticut
Fri., 23 – Summit, N.J. to Nevada
Sat., 24 – Nevada to Summit, N.J.
Sun., 25 – Summit, N.J.
Thurs., 29 – Washington, D.C.

Total: 16 days outside New York State/City

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[14] According to Mr. Tamagni, the diaries indicated that he was in Washington, D.C., but he had "no recollection of the trip" (tr., p. 144).

[15] Mr. Tamagni noted that he arrived in Newark at 11:30 A.M. and did not recall whether he went to his New York City office on that day (tr., p. 145).

October 1988

Sat., 1 – Summit, N.J.
Sun., 2 – Summit, N.J.
Mon., 3 – Birmingham, Alabama
Tues., 4 – Outside New York per stipulation
Sat., 8 – Summit, N.J.
Sun., 9 – Summit, N.J.
Wed., 12 – Outside New York per stipulation
Thurs., 13 – Phoenix to Summit, N.J.
Fri., 14 – New Hampshire
Sat., 15 – New Hampshire
Sun., 16 – New Hampshire
Mon., 17 – New Hampshire to Summit, N.J.
Sat., 22 – Outside New York per stipulation
Sun., 23 – Outside New York per stipulation
Thurs., 27 – Phoenix to Summit, N.J.
Sat., 29 – Summit, N.J.
Sun., 30 – Summit, N.J.

Total: 17 days outside New York State/City

November 1988

Sat., 5 – Outside New York per stipulation
Sun., 6 – Outside New York per stipulation
Wed., 9 – San Francisco/Seattle
Sat., 12 – Summit, N.J.
Sun., 13 – Summit, N.J.
Thurs., 17 – Los Angeles
Sat., 19 – Summit, N.J.
Sun., 20 – Summit, N.J.
Thurs., 24 – Summit, N.J.
Fri., 25 – Summit, N.J.
Sat., 26 – Summit, N.J.
Sun., 27 – Summit, N.J.
Wed., 30 – Outside New York per stipulation

Total: 13 days outside New York State/City

December 1988

Thurs., 1 – Outside New York per stipulation
Sat., 3 – Summit, N.J.
Sun., 4 – Summit, N.J.
Sat., 10 – Summit, N.J.
Sun., 11 – Summit, N.J.
Sat., 17 – Summit, N.J.
Sun., 18 – Summit, N.J.
Fri., 23 – Summit, N.J.
Sat., 24 – Summit, N.J.
Sun., 25 – Summit, N.J.
Mon., 26 – Summit, N.J.
Thurs., 29 – Washington, D.C.
Fri., 30 – Summit, N.J.
Sat., 31 – Summit, N.J.

Total: 14 days outside New York State/City

These 1988 monthly totals add up to 177 days outside New York City and 175 days outside New York State, or 189 days in New York City and 191 days in New York State for 1988. (It is observed that 1988 was a leap year with a total of 366 days.)

January 1989

Sun., 1 – Summit, N.J.
Mon., 2 – Summit, N.J.
Sat., 7 – Summit, N.J.
Sun., 8 – Summit, N.J.
Fri., 13 – New Hampshire
Sat., 14 – New Hampshire
Sun., 15 – New Hampshire
Mon., 16 – New Hampshire
Wed., 18 – Sacramento, California
Thurs., 19 – Outside New York per stipulation
Fri., 20 – Utah to New Jersey
Sat., 21 – Summit, N.J.

Sun., 22 – Summit, N.J.
Wed., 25 – Washington, D.C.
Thurs., 26 – Outside New York per stipulation
Sat., 28 – Summit, N.J.
Sun., 29 – Summit, N.J.

Total: 17 days outside New York State/City

February 1989

Fri., 3 – New Hampshire
Sat., 4 – New Hampshire
Sun., 5 – New Hampshire
Mon., 6 – New Hampshire to Summit, N.J.
Sat., 11 – Summit, N.J.
Sun., 12 – Summit, N.J.
Sat., 18 – Boston
Sun., 19 – Boston
Mon., 20 – Boston to Summit, N.J.
Tues., 21 – Sacramento
Wed., 22 – Sacramento to Summit, N.J.
Sat., 25 – Summit, N.J.
Sun., 26 – Summit, N.J.
Tues., 28 – Outside New York per stipulation

Total: 14 days outside New York State/City

March 1989

Wed., 1 – Outside New York per stipulation
Tues., 2 – Phoenix to Summit, N.J.
Sat., 4 – Summit, N.J.
Sun., 5 – Summit, N.J.
Thurs., 9 – Boston/Washington, D.C.
Sat., 11 – Summit, N.J., but also
theater in New York City
Sun., 12 – Summit, N.J.
Mon., 13 – Outside New York per stipulation

Tues., 14 – Washington, D.C. to Summit, N.J.
Fri., 17 – Columbia, South Carolina
Sat., 18 – Summit, N.J.
Sun., 19 – Summit, N.J.
Wed., 22 – Phoenix, Arizona
Thurs., 23 – Phoenix to Summit, N.J.
Fri., 24 – Summit, N.J.
Sat., 25 – Summit, N.J.
Sun., 26 – Summit, N.J.

Total: 16 days outside New York State/City

April 1989

Sat., 1 – Summit, N.J.
Sun., 2 – Summit, N.J. to Portland, Maine
Mon., 3 – Augusta, Georgia to Summit, N.J.
Sat., 8 – Summit, N.J.
Sun., 9 – Summit, N.J.
Thurs., 13 – Phoenix, Arizona to Summit, N.J.
Sat., 15 – Summit, N.J.
Sun., 16 – Summit, N.J.
Wed., 19 – Outside New York per stipulation
Thurs., 20 – Outside New York per stipulation
Fri., 21 – Outside New York per stipulation
Sat., 22 – Outside New York per stipulation
Sun., 23- San Francisco to Summit, N.J.
Fri., 28 – Boston/Richmond, Virginia
Sat., 29 – Richmond
Sun., 30 – Richmond

Total: 16 days outside New York State/City

May 1989

Sat., 6 – Outside New York per stipulation
Sun., 7 – Outside New York per stipulation

Sat., 13 – Summit, N.J.
Sun., 14 – Outside New York per stipulation
Fri., 19- Los Angeles to Summit, N.J.
Sat., 20 – Summit, N.J.
Sun., 21 – Summit, N.J.
Fri., 26 – Outside New York per stipulation
Sat., 27 – Outside New York per stipulation
Sun., 28 – Outside New York per stipulation
Mon., 29 – Outside New York per stipulation
Tues., 30 – Outside New York per stipulation

Total: 12 days outside New York State/City

June 1989

Sat., 3 – Summit, N.J.
Sun., 4 – Summit, N.J.
Sat., 10 – Summit, N.J.
Sun., 11 – Summit, N.J.
Sat., 17 – Summit, N.J.
Sun., 18 – Summit, N.J.
Sat., 24 – Summit, N.J.
Sun., 25 – Summit, N.J.
Tues., 27 – Albany to Summit, N.J.
Fri., 30 – New Hampshire

Total: 10 days outside New York City
9 days outside New York State

July 1989

Sat., 1 – Outside New York per stipulation
Sun., 2 – Outside New York per stipulation
Mon., 3 – Outside New York per stipulation
Tues., 4 – Outside New York per stipulation
Wed., 5 – Outside New York per stipulation
Thurs., 6 – Outside New York per stipulation
Fri., 7 – Outside New York per stipulation

Sat., 8 – New Hampshire
Sun., 9 – New Hampshire to Summit, N.J.
Thurs., 13 – Outside New York per stipulation
Fri., 14 – San Francisco
Sat., 15 – Summit, N.J.
Sun., 16 – Summit, N.J.
Tues., 18 – Outside New York per stipulation
Fri., 21 – Lansing, Michigan
Sat., 22 – Summit, N.J.
Sun., 23 – Summit, N.J.
Tues., 25 – Danvers, Massachusetts
Sat., 29 – Summit, N.J.
Sun., 30 – Summit, N.J.

Total: 20 days outside New York State/City

August 1989

Sat., 5 – Summit, N.J.
Sun., 6 – Summit, N.J.
Mon., 7 – Syracuse, New York
Thurs., 10 – Detroit, Michigan to Summit, N.J.
to New Hampshire
Fri., 11 – Outside New York per stipulation
Sat., 12 – Outside New York per stipulation
Sun., 13 – Outside New York per stipulation
Mon., 14 – Outside New York per stipulation
Tues., 15 – Outside New York per stipulation
Wed., 16 – Outside New York per stipulation
Thurs., 17 – Seattle to Summit, N.J.
Sat., 19 – Summit, N.J.
Sun., 20 – Summit, N.J.
Thurs., 24 – Syracuse, New York
Fri., 25 – Boston
Sat., 26 – Summit, N.J.
Sun., 27 – Summit, N.J.
Thurs., 31 – New Hampshire

Total: 18 days outside New York City
16 days outside New York State

September 1989

Fri., 1 – Outside New York per stipulation
Sat., 2 – Outside New York per stipulation
Sun., 3 – Outside New York per stipulation
Mon., 4 – Outside New York per stipulation
Tues., 5 – New Hampshire to Summit, N.J.
Sat., 9 – Summit, N.J.
Sun., 10 – Summit, N.J.
Thurs., 14 – Boston
Sat., 16 – Summit, N.J.
Sun., 17 – Summit, N.J.
Wed., 20 – Syracuse, New York
Sat., 23 – Summit, N.J.
Sun., 24 – Summit, N.J.
Wed., 27 – Boston
Sat., 30 – Outside New York per stipulation

Total: 15 days outside New York City
14 days outside New York State

October 1989

Sun., 1 – Outside New York per stipulation
Mon., 2 – New Hampshire to Summit, N.J.
Thurs., 5 – Bloomington, Minnesota from Summit, N.J.
Sat., 7 – Summit, N.J.
Sun., 8 – Summit, N.J.
Wed., 11 – Washington, D.C. from Summit, N.J.
Sat., 14 – Summit, N.J.
Sun., 15 – Summit, N.J.
Sat., 21 – Summit, N.J.
Sun., 22 – Summit, N.J.
Thurs., 26 – Phoenix, Arizona
Sat., 28 – Summit, N.J.
Sun., 29 – Summit, N.J.

Total: 13 days outside New York State/City

November 1989

Thurs., 2 – Phoenix, Arizona from Summit, N.J.
Fri., 3 – Outside New York per stipulation
Sat., 4 – Phoenix, Arizona to Summit, N.J.
Sun., 5 – Summit, N.J.
Sat., 11 – Summit, N.J.
Sun., 12 – Summit, N.J.
Mon., 13 – Phoenix, Arizona from Summit, N.J.
Tues., 14 – Phoenix, Arizona to Summit, N.J.
Fri., 17 – Boston
Sat., 18 – Summit, N.J.
Sun., 19 – Summit, N.J.
Wed., 22 – Phoenix, Arizona from Newark, N.J.
Thurs., 23 – Phoenix to Summit, N.J.
Fri., 24 – Summit, N.J.
Sat., 25 – Summit, N.J.
Sun., 26 – Summit, N.J.
Mon., 27 – Phoenix, Arizona from Summit, N.J.
Tues., 28 – Outside New York per stipulation
Wed., 29 – Outside New York per stipulation
Thurs., 30 – Outside New York per stipulation

Total: 20 days outside New York State/City

December 1989

Fri., 1 – Boca Raton, Florida
Sat., 2 – Summit, N.J.
Sun., 3 – Summit, N.J.
Wed., 6 – Phoenix, Arizona from Summit, N.J.
Thurs., 7 – Phoenix to Summit, N.J. to Washington, D.C.
Sat., 9 – Summit, N.J.
Sun., 10 – Summit, N.J.
Fri., 15 – Chicago, Illinois to Summit, N.J.
Sat., 16 – Summit, N.J.
Sun., 17 – Summit, N.J.
Fri., 22 – Harrisburg, Pennsylvania

Sat., 23 – Summit, N.J.
Sun., 24 – Summit, N.J.
Mon., 25 – Summit, N.J.
Tues., 26 – Summit, N.J.
Sat., 30 – Summit, N.J.
Sun., 31 – Summit, N.J.

Total: 17 days outside New York State/City

These 1989 monthly totals add up to 188 days outside New York City and 184 days outside New York State, or 177 days in New York City and 181 days in New York State.

16. During the auditor's testimony at the hearing, certain discrepancies between the diaries (Petitioners' Ex. "3" through "8") and the expense reports (Petitioners' Ex. "9", through "11") were alleged. The first related to November 4, 1987. The diaries indicated that Mr. Tamagni was in San Francisco on November 4th and 5th, but the expense reports indicated a charge in San Francisco for November 2nd and that Mr. Tamagni was in San Francisco from November 2nd through 4th (tr., pp. 285-286). The charge on November 2nd related to the use of an airphone. However, there were no other charges for the dates on the expense report (tr., pp. 304-305).

The next inconsistency raised by the auditor concerned August 25, 1988 because Mr. Tamagni's diary noted a meeting in New York City, while Ms. Musalo's diary stated "Cleveland" (tr., pp. 287-288). However, Ms. Musalo's diary also indicated that "Cleveland" was "cancelled" so that the auditor's focus on this date is inexplicable. Similarly, although it was not clear from his direct examination what the alleged inconsistency was, on cross-examination, the auditor explained that there were no entries in Mr. Tamagni's diary for August 26th through the 28th, yet there were charges for the 28th and 30th (tr., pp. 305-307). The auditor did not explain why a charge on August 30th was relevant to what the diary indicated for August 26, 27, and 28. In

addition, Mr. Tamagni did not claim that he was out of New York on August 26, 1988.

On Thursday, October 13, 1988, according to Ms. Musalo's diary, Mr. Tamagni was returning from Phoenix, Arizona. In addition, the Division produced an American Express charge for the Holiday Inn in White River Junction, Vermont, signed by Mrs. Tamagni for such date. The auditor raised these facts to demonstrate that petitioners did not always travel together. However, this was consistent with petitioners' testimony that Mrs. Tamagni rarely traveled with her husband on business (tr., pp. 64, 220 and 307). Moreover, the diaries indicated New Hampshire for that weekend. Petitioners provided the following reason for the Vermont hotel charge for a date on which Mr. Tamagni was in Phoenix: Mrs. Tamagni picked her husband up at the airport and they stopped at a hotel for the night on their way up to New Hampshire for the weekend (tr., pp. 308-310).

Finally, when questioned about inconsistencies, the auditor raised January 18, 1989. Ms. Musalo's diary indicated that Mr. Tamagni left LaGuardia Airport at 6:30 A.M. for Chicago. The auditor questioned whether Mr. Tamagni slept at his New York City apartment the previous night in light of the early departure (tr., p. 291). Mr. Tamagni noted that from his Manhattan apartment to John F. Kennedy Airport took 40 minutes to travel, while from his New Jersey home to Kennedy Airport took 70 minutes, only 30 minutes longer (tr., p. 204).

These alleged discrepancies were the only ones raised by the Division at the hearing. In short, out of 1,096 days at issue during 1987, 1988 and 1989, discrepancies were claimed with respect to only a handful of days. In fact, on cross-examination, the auditor acknowledged that there were not many discrepancies between the diaries and the expense reports – only one or two during the three years at issue (tr., pp. 312-313).

17. Petitioners contend that in addition to the days listed above as days outside New York, Mr. Tamagni did not go into work in New York City due to illness on one or two days per year:

Attorney Rosen: "Mr. Tamagni, are there times during 1987, '88 and '89 when you did not go to your office in New York because you were not feeling well?"

John Tamagni: "I had an occasional sick day, yes."

Attorney Rosen: "What is your guess about how many days a year that would be?"

John Tamagni: "I'm healthy. One or two days a year."

Attorney Rosen: "One or two days a year. Do you have to keep track of your sick days? Do you have an allocated number of sick days?"

John Tamagni: "No." (Tr., pp. 117-118.)

Mr. Tamagni was then queried by his attorney concerning days during the years at issue which appear blank in the diaries on which he "might have been" sick (tr., P. 118).

18. Petitioners also contend that Mr. Tamagni occasionally took an extended weekend by taking off a Monday or Friday:

Attorney Rosen: "The days I asked for 1987, '88, '89 [when Mr. Tamagni might have been sick] are Fridays and Mondays that appear blank in your diary. Did you ever take three-day weekends during those years as far as being at home in New Jersey?"

John Tamagni: "On rare occasions."

Attorney Rosen: "Once or twice?"

John Tamagni: "Once or twice." (Tr., p. 199.)

19. There were some days which Mr. Tamagni might have claimed to have been outside New York based upon

entries or the lack of entries in the diaries, but, instead, he treated such days as New York days:

Day and Page	Transcript Mr. Tamagni's Position
Day: August 13, 1987 pp. 99-100	Conceivably could have been in N.Y.C. apartment morning of flight from LaGuardia to Albany.
Day: September 28, 1987 p. 106	Business meeting at night in N.Y.C. after return from Columbia, South Carolina.
Day: October 1, 1987 p. 107	In Mineola, Nassau County, but could have spent part of day in N.Y.C.
Day: February 10, 1988 p. 125	In North Hempstead, Nassau County, but conceivably was also in N.Y.C. that day.
Day: March 17, 1988 p. 128	In Washington, D.C., but might have spent night before in N.Y.C. and left for airplane from N.Y.C. apartment.
Day: April 20, 1988 p. 132	In Rocky Hill, Connecticut, but does not recall whether he left from New York or New Jersey.
Day: August 29, 1988 pp. 144-145	Diaries indicate Washington, D.C., but had no recollection of the trip.

Day and Page	Mr. Tamagni's Position
Day: October 31, 1988 p. 152	In Hartford, Connecticut, but probably left from N.Y.C.
Day: November 10, 1988 p. 153	On return from Seattle at 8:40 P.M. went to N.Y.C. apartment.
Day: October 31, 1989 No reference in transcript	Diary says in Syracuse, but petitioner did not claim outside N.Y.C.

20. The testimony of petitioner Janet Tamagni concerning the number of weekends that petitioners were in New York City varied considerably[16] from her husband's:

Attorney Rosen: "During the years 1987 through 1989, did you ever come to New York City during the week?"

Janet Tamagni: "Yes."

Attorney Rosen: "Do you ever come during the weekends?"

Janet Tamagni: "Very rarely."

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[16] Mrs. Tamagni did not enter the hearing room until 12:09 P.M. on the first day of the hearing on September 28, 1994, and she was not present in the hearing room during a large part of the afternoon session on September 28, 1994. It was not until 4:25 P.M. on September 28, 1994 that she testified. In sum, Mrs. Tamagni did not hear most of her husband's testimony.

Attorney Rosen: "How often would you estimate you would come each year to New York City on the weekends?"

Janet Tamagni: "Maybe five."

Attorney Rosen: "Did you ever come to New York City by yourself on weekends?"

Janet Tamagni: "No."

Attorney Rosen: "Could it have been as much as ten times a year?"

Janet Tamagni: "No."

Attorney Rosen: "Could it have been as much as seven?"

Janet Tamagni: "Me alone or together?"

Attorney Rosen: "Together."

Janet Tamagni: "Anything is possible but –"

Attorney Rosen: "What is your belief?"

Janet Tamagni: "I don't know."

Attorney Rosen: "Could it have been as few as three?"

Janet Tamagni: "No. Probably more like five."

Attorney Rosen: "When you would come to the City on those five times, approximately, a year on the weekends, what would you do?"

Janet Tamagni: "We would go to dinner with some friends. Spend the night. Sometimes come home on Saturday night because Jack likes to, like he said, be home on Sunday to do chores and stuff."

Attorney Rosen: "Do you remember spending a Saturday night in the City?"

Janet Tamagni: "As I say three, four, five times maybe."

Attorney Rosen: "I'm asking the first question I asked and I should re-ask. I'm not talking about nights. The first question I asked was how many times during each of those years would you and Mr. Tamagni come into the City. Not spend the night, come into the City. That was the first question I asked."

Janet Tamagni: "Oh."

Attorney Rosen: "Was that approximately five, more than five, less than five?"

Janet Tamagni: "Maybe a little more than five. I don't know."

Attorney Rosen: "Could be as many as seven?"

Janet Tamagni: "It's possible."

Attorney Rosen: "Could it be ten?"

Janet Tamagni: "I don't know."

Attorney Rosen: "You don't know?"

Janet Tamagni: "I don't remember that far back. I don't know."

Attorney Rosen: "To –"

Janet Tamagni: "I hate to say no because I don't want to lie on the stand but I don't think so."

Attorney Rosen: "Could it – You think it would be more than three?"

Janet Tamagni: "Yes. Bigger than a bread box."

Attorney Rosen: "How many Saturday nights each year, approximately, did you spend in the apartment in New York City?"

Janet Tamagni: "As I said, probably three, four, five."

Attorney Rosen: "Half of the time you would come to the City on the weekends, you'd spend the night on a Saturday?"

Janet Tamagni: "I don't see what difference it makes but I don't remember."

Attorney Rosen: "Do you keep a diary or calendar?"

Janet Tamagni: "No diary; calendar, yeah."

Attorney Rosen: "Do you have that calendar for 1986 to 19–"

Janet Tamagni: "I have no calendar but 1993."

Attorney Rosen: "What did you do with the calendars for '87, '88, '89?"

Janet Tamagni: "I threw them away."

Attorney Rosen: "When did you throw them away?"

Janet Tamagni: "Every year."

Attorney Rosen: "When would you have thrown away the 1987 calendar?"

Janet Tamagni: "1988."

Attorney Rosen: "Subsequent year to the year?"

Janet Tamagni: "You got it."

Attorney Rosen: "Same for '88 through '89?"

Janet Tamagni: "Um-hmm."

Attorney Rosen: "In '89 you threw away '88?"

Janet Tamagni: "Yes." (Tr., pp. 254-257.)

21. On direct examination, Mr. Tamagni testified that he purchased the Manhattan apartment at 29 East 64th Street "[p]rincipally to provide a place that I could spend the night if I had been working late or to reduce the rigors of communication from Summit, New Jersey" (tr., pp. 46-47).

Later in the hearing, it was disclosed during questioning by the Administrative Law Judge that in 1980 or 1981, Mr. Tamagni had purchased a Manhattan apartment at 25 West 54th Street and that the one at 29 East 64th Street was a replacement (tr., p. 206). He also testified that he was aware "in a general way" at the time he purchased the apartment at 29 East 64th Street of the possibility of being treated as a statutory resident of New York if he spent more than 183 days in New York (tr., p. 206).

In contrast, Mrs. Tamagni, a more forthright witness than her husband and certainly less prepared by counsel, provided a broader reason for the purchase of the apartment at 29 East 64th Street:

"My dream had been to be a 'New Yorker' and virtually do what we're being accused of doing now, being a resident . . ." (tr., p. 264).

22. Petitioners introduced into the record as their Exhibits "12" and "13" affidavits each dated September 23, 1993 of Steven Dowd and Edward Meade, respectively, who were doormen at the "residential building located at 29 East 64th Street in New York City." Mr. Dowd stated that he "never saw Mr. Tamagni at the apartment on weekends, and only occasionally during the week" during the years at issue. Mr. Meade indicated that "it was extremely rare for me to see Mr. Tamagni on weekends" and that he "saw him only occasionally (approximately one or two days each week)" during the years at issue. Both men noted that there are only 46 apartments in the building and Mr. Tamagni is one of the very few who do not live at the building on a full-time basis.

23. The Division introduced into evidence as its Exhibit "R" a Statement of Personal Income Tax Audit Changes dated September 28, 1993 which asserts additional tax for 1988 and 1989 based upon an increase in the allocation to New York of the partnership income of Lazard Freres and Co., if it is determined that petitioners were taxable as nonresidents only. These alternative calculations result in

additional tax of $4,659.32 ($4,238.36, State; $420.96, City) plus negligence penalty and interest for 1988, and of $2,028.35 ($1,826.78, State; $201.57, City) plus negligence penalty and interest for 1989. Petitioners' attorney responded as follows to this alternative calculation:

"[W]e will look into the issue and we concede the partnership changes in the effort. I haven't checked the numbers but if they are consistent with the partnership audit and the other partners, we have no objection" (tr., pp. 299-300).

Petitioners did not contest the alternative calculation in their briefs.

Changes to the Transcript

24. With their brief dated December 2, 1993, petitioners enclosed an errata sheet listing ten errors or discrepancies in the transcript to which petitioners and the Division agreed. The Division disagreed with four other corrections. In his letter dated December 2, 1993 transmitting petitioners' brief and the errata sheet, attorney Rosen noted "[t]o support [petitioners'] interpretation, we have enclosed a photocopy of the outline I used at the hearing for the direct examination of Mr. Tamagni." By a letter dated February 3, 1994, the Administrative Law Judge wrote the hearing reporter asking her to review the contested "errors". By a letter dated February 18, 1994, the reporter responded that she agreed with the proposed changes since she had misread certain "key strokes". By a letter dated March 16, 1994, the Division's attorney, citing the reporter's letter, noted that it "does not oppose the three enumerated amendments to the transcript." The fourth change requested by petitioners was that Mr. Tamagni's response of "Um-hmm" (tr., p. 116, lines 17-18) was an affirmative response. Since this change was, in fact, a matter of interpretation rather than a correction, the transcript was not changed.

25. Petitioners submitted 37 proposed findings of fact. Proposed findings of fact "1", "2", "3", "5", "10", "11", "13", "14", "17", "18", "19", "21", "22", "23", "24", "25", "26", "27", "28", "32", "33", "34", "35", "36" and "37" are accepted and incorporated into this determination.

Proposed findings of fact "4", "6", "7", "8", "9", "12", "15", "16", "20" and "29" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

(i) Proposed finding of fact "4" includes the inexact statement that petitioners used their New Hampshire house "during the entire year." Mr. Tamagni testified that they rarely used it during the spring, which was a "muddy" season in New Hampshire (tr., p. 69).

(ii) The number of times petitioners went into New York City on weekends is addressed in Findings of Fact "15", and "20", which set forth Mr. Tamagni's position and Mrs. Tamagni's position, respectively, in this regard. To the extent the proposed finding of fact "6" suggests that Mr. Tamagni's testimony concerning the amount of time he spent in New York City on weekends should prevail, it is rejected since such matter is properly resolved in the Conclusions of Law.

(iii) Proposed finding of fact "7" is rejected for the same reason that proposed finding of fact "6" was rejected.

(iv) Proposed finding of fact "8" is rejected to the extent it limits the motive for purchasing the Manhattan apartment by excluding Mrs. Tamagni's motivation for purchasing the residence and the use of the term "rarely used" is rejected since the matter of how much time petitioners spent in New York City on weekends is best resolved in the Conclusions of Law.

(v) Proposed finding of fact "9" is rejected to the extent of the use of the inexact term of "rare".

(vi) Proposed finding of fact "12" is rejected to the extent that it states that Ms. Musalo never recorded Mr. Tamagni's personal appointments, which conflicts with Finding of Fact "14". The reference to the transcript at pages 69 and 70 in support of the last sentence of proposed finding of fact "12" is incorrect since the question on pages 69 and 70 at lines 22 through 24 and 1 and 2, respectively, does not reflect what counsel apparently meant to ask.

(vii) Proposed finding of fact "15" references, in its footnote "3", June 26 and August 13, 1987 as exceptions to Mr. Tamagni's practice of generally leaving his home in New Jersey (as opposed to the New York City apartment) if a flight departed before 11:00 A.M. March 17, 1988 was another exception to this practice.

(viii) Proposed finding of fact "16" is rejected to the extent of its use of the phrase "more frequently".

(ix) Proposed finding of fact "20" is rejected to the extent that it states that petitioners' former representative provided the auditor with schedules listing dates on which Mr. Tamagni was not present in New York State/City.

(x) Proposed finding of fact "29" includes the following errors with regard to the days outside New York State/City:

Date	Error
February 17, 1987	Petitioner was also outside New York State/City on this day (tr., p. 81).

March 25, 26 and 27, 1997	Petitioner was in Springfield on March 25, 1987 but in N.Y.C. on March 26 and 27 according to the diaries.
June 11, 1987	Petitioner was in N.Y.C. according to the diaries, and Mr. Tamagni did not suggest otherwise.
August 17, 1987	Petitioner testified that he was in Boston on the 17th, but the diaries indicate he was there on the 18th.
January 6, and 7, 1988	Petitioner was in N.Y.C. on these dates, and Mr. Tamagni did not testify otherwise.
March 17, 1988	Mr. Tamagni testified that he was in Washington, D.C. on this date, but he also indicated that he might have spent the night before and therefore the early morning of the 17th in the N.Y.C. apartment (tr., p. 128).
June 27, 1988	Petitioner was also in Seattle on this day.
July 13, 16, and 17, 1988	These dates were stipulated to by the parties as outside New York State/City, and petitioners therefore counted them twice as days outside New York State/City.
August 31, 1988	As noted in footnote "15", Mr. Tamagni testified that he arrived in Newark at 11:30 A.M. and did not recall whether he then went to his N.Y.C. office on that day.

November 30, 1988 and December 1, 1988	These days were stipulated to by the parties as outside New York State/City and, therefore, petitioners counted them twice.

(xi) Proposed finding of fact "30" is rejected to the extent that it waffles between two days or three days as the number of days which Mr. Tamagni spent, presumably at his home in New Jersey, due to illness or an extended weekend. Such waffling reflects the somewhat speculative nature of petitioners' position in this regard which is addressed in the Conclusions of Law.

(xii) Proposed finding of fact "31" is rejected because it is more in the nature of a conclusion of law.

Petitioners have also proposed 11 conclusions of law. However, there is no requirement in the law or regulations to rule on them (State Administrative Procedure Act §307[1]).

SUMMARY OF THE PARTIES' POSITIONS

26. Petitioners argue that they presented sufficient evidence to establish that they were not present in New York State/City for more than 183 days during 1987, 1988 or 1989. Mr. Tamagni's testimony concerning his whereabouts, by reference to the diaries he and his secretary maintained as well as expense reports prepared during the course of his employment, satisfied "the burden on taxpayers [under the New York Tax Law] to prove that they were not present in New York for more than 183 days" (Petitioners' brief, p. 20). Petitioners contend that the testimony of Mrs. Tamagni, the testimony of Ms. Musalo and the affidavits of the two doormen "assure the credibility of his testimony." Petitioners point out that Mr. Tamagni testified that he and his wife "went into New York City on only the following four

weekend days: October 24, 1987, March 27, 1987, June 18, 1988, and March 11, 1989" (Petitioners' brief, p. 7, footnote "4"). In the brief, they minimize Mrs. Tamagni's testimony that petitioners were in New York City on weekends five or seven times a year (staying overnight as well in the Manhattan apartment) because ultimately she stated "she really did not know for sure" (Petitioners' brief, p. 7, footnote "4"). In addition, any discrepancies in the diaries cited by the Division did not prove to be actual discrepancies. Furthermore, although certain dates in the diaries (generally weekends and holidays) were "blank days", containing no entries, petitioners' testimony was sufficient to establish that on such "blank days" they were not present in New York State/City.

Petitioners also argue that Tax Law §605(b)(1) is unconstitutional as applied to petitioners because it is not internally consistent since petitioners are domiciled in another state:

"Although the credit that New York grants (and, by assumption, New Jersey would grant) for taxes paid to other states would offer some limit to the double taxation of the Petitioners' income, [footnote omitted] the credit would have no application to income the Petitioners derived from intangibles not employed in a business carried on in such other state. [Citation omitted.] Consequently, Petitioners would be subjected to multiple taxation on all of their income earned from stocks, bonds, and other intangibles not employed in his [sic] business. By contrast, an individual who confined all of his or her activities to a single state would be taxed only once on his or her intangible income. The imposition of a greater burden upon a taxpayer engaged in activity across state lines, as compared to a taxpayer who limits his or her activity to a single state, merely because the former has engaged in activity in more than one state is a quintessential violation of the 'internal consistency' principle" (Petitioners' brief, pp. 43-44).

In addition, petitioners argue that Article XVI (§3) of the New York State Constitution prohibits the Division from taxing a nondomiciliary's income from intangibles not employed in a New York business. This prohibition applies even if the nondomiciliary satisfies New York's 183-day residency test and, as a result, application of section 605(b)(1) to petitioners is unconstitutional.

Finally, petitioners maintain that if they are found to be New York residents, "the penalties should be abated since Petitioners were not negligent in calculating their New York tax liability as nonresidents" (Petitioners' brief, p. 26). Petitioners reasonably believed that they did not spend more than 183 days in New York during the years at issue based upon the diaries and expense reports.

27. The Division, in its brief, notes that:

"[t]his case boils down to what evidence is sufficient to prove a taxpayer's whereabouts on any specific day in order to sustain his burden to demonstrate that he was not present within New York City for more than 183 days" (Division's brief, p. 5).

The Division maintains that the respective diaries maintained by Mr. Tamagni and his secretary were not sufficient to carry this burden without additional documentation such as bank statements, cancelled checks, utility bills for in-state and out-of-state homes and telephone bills. Furthermore, Mrs. Tamagni's testimony concerning weekend days spent in New York City contradicted that of her husband's. The Division points out that "it is encouraging to recognize that after being asked the same question repeatedly, Mrs. Tamagni's answer did not change [concerning number of weekend days spent in New York City]" (Division's brief, p. 9). The Division also rejects petitioners' attempt to count "possible sick days and possible three-day weekends" as days outside New York State/City as "not documented" and "hypothetical" (Division's brief, p. 9). The Division emphasizes that crucial testimony of Mr.

Tamagni was brought out "in the form of 'yes' or 'no' answers in response to leading questions" citing the transcript at pages 51-54, 62-68, 197-204, 247-248, and 260-261 (Division's brief, p. 11).

According to the Division, penalty should be sustained because reliance "on the advice of tax professionals is not sufficient to prove that his conduct was not negligent" (Division's brief, p. 12). The Division rejects petitioners' argument that Tax Law §605(b)(1) is unconstitutional as applied to them, citing Matter of Mallinckrodt (Tax Appeals Tribunal, November 12, 1992).

28. In their reply brief, petitioners argue that "any reliance on Mrs. Tamagni's testimony to establish conclusively the specific number of weekend days spent by Petitioners in New York City during the years in issue is completely misplaced" (Petitioners' reply brief, p. 10) because she ultimately testified that "she did not want to testify conclusively as to a particular number since she did not know for certain the precise number and did not want to lie on the stand" (Petitioners' reply brief, p. 10). Petitioners also contend that Mr. Tamagni's sick days and long weekends were not "hypothetical":

"Mr. Tamagni testified, as a fact, that he actually did spend a certain number of days at home due to illness or taking a long weekend" (Petitioners' reply brief, p. 11; emphasis in original).

Petitioners argue that "[c]ontrary to the Division's contentions, Petitioners do not rely on the advice provided by tax professionals to support their claim for the abatement of penalties" (Petitioners' reply brief, p. 16). Rather, petitioners were not negligent in filing as nonresidents because they "clearly believed that they did not spend more than 183 days in New York during the years at issue, they filed their New York returns on the good faith belief that they were nonresidents and acted reasonably in the way they

maintained proof of their whereabouts" (Petitioners' reply brief, p. 17).

CONCLUSIONS OF LAW

A. Tax Law §605(b)(1) defines "resident individual" as someone:

> "(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or . . .
>
> "(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States."

B. The definition of "resident" for City income tax purposes, pursuant to the New York City Administrative Code §11-1705(b), is identical to that for State income tax purposes given above, except for the substitution of the term "city" for "state".

C. As noted in Finding of Fact "13", the parties stipulated that petitioners were not domiciled in New York during the years at issue. Therefore, it is only the second part of the definition of "resident individual" at issue herein.

D. The Division, in its brief, correctly noted:

> "[t]his case boils down to what evidence is sufficient to prove a taxpayer's whereabouts on any specific day in order to sustain his burden to demonstrate that he was not present within New York [State and] City for more than 183 days."

The Tax Appeals Tribunal, in its recent decision in Matter of Avildsen (May 19, 1994), has made it clear that testimony alone may well be sufficient to carry this burden:

> "[W]e find no support in the statute or regulations for the Administrative Law Judge's conclusion that testimony alone was insufficient as a matter of law to prove that petitioner did not spend more than 183 days in New York."

In Avildsen, the taxpayer's proof of days outside New York City consisted of (i) his secretary's testimony, which was based upon her review of desk diaries and calendars that she kept for the taxpayer, and a schedule she prepared of days in and out of New York City, (ii) airline bills and (iii) telephone and utility bills for both the taxpayer's Manhattan apartment and his Hamptons (Long Island)-area home. The actual diaries and calendars were not produced by the taxpayer.

Consequently, the Division's position that the diaries maintained by Mr. Tamagni and his secretary were not sufficient to carry petitioners' burden of proof without additional documentation such as bank statements, cancelled checks, utility bills and telephone bills is rejected. However, the Tax Appeals Tribunal in Avildsen also signaled a warning to taxpayers who might rely only on testimony and limited documentary proof:

> "To prove that a taxpayer was not present in New York or New York City for more than 183 days through only testimony is a very significant task because the witness will have to convince the Administrative Law Judge that the witness was in a position to know the taxpayer's whereabouts on every day of a specific year or years, that the witness can accurately remember such details and, as well, that the witness is truthfully recounting these details."

E. In the matter at hand, unlike Avildsen, petitioners did not present only a third party to testify as to the taxpayers' whereabouts during the years at issue. Rather, Mr. Tamagni testified at great length concerning his whereabouts during

the years at issue. Therefore, the issue in Avildsen concerning whether "the witness was in a position to know the taxpayer's whereabouts on every day of a specific year or years" is not germane to this proceeding (other than to the extent that Ms. Musalo, petitioner's secretary, established a reasonable basis for her awareness of Mr. Tamagni's whereabouts). However, whether Mr. Tamagni accurately remembered the details concerning his whereabouts and whether he truthfully recounted these details is at the heart of this matter.

F. It is noted that Mr. Tamagni had his own diaries as well as his secretary's diaries (which were introduced into evidence, unlike the situation in Avildsen) to refresh his recollection in detailing his whereabouts during the years at issue. However, the diaries contained many blank days and, as noted in Finding of Fact "15", Mr. Tamagni based his testimony that his weekends were spent in New Jersey (if the diaries did not specify New Hampshire or some other place) based upon his "practice to spend my weekends with my wife at home" and not on specific entries in the diaries which noted New Jersey as his whereabouts on the weekend days.[17] As noted in Finding of Fact "15", Mr. Tamagni specified only four weekend days during a three-year period when he was present in New York City: Saturday, October 24, 1987; Sunday, March 27, 1988; Saturday, June 18, 1988; and Saturday, March 11, 1989.

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[17] As noted in Finding of Fact "14", schedules were prepared for Lazard Freres listing the whereabouts of partners on weekends. The fact that petitioners did not introduce these schedules into evidence or provide an explanation why they were not available will not be held against petitioners (see, Matter of Avildsen, supra [wherein the Tribunal noted that "if the Division wishes to obtain documents in the possession of the taxpayer that the taxpayer refuses to introduce into evidence, the Division can use its subpoena power"]). Furthermore, in the matter at hand, petitioners did not refuse to introduce such documents. They just did not do so.

G. However, it is concluded that Mr. Tamagni's testimony concerning the number of weekend days he was present in New York City is outweighed by the testimony of his wife which is quoted at great length in Finding of Fact "20". It is observed that Mrs. Tamagni persevered in her position that she and her husband came into New York City five times on the weekends during each of the years at issue and spent "three, four, five" Saturday nights in their Manhattan apartment during each of the years. It was not until Mrs. Tamagni was questioned persistently by the taxpayers' attorney that she began to shift her position, and I do not give weight to her change in position: that she does not "remember that far back." Further, her clearly unscripted testimony was in marked contrast to the prepared testimony of Mr. Tamagni. In short, Mrs. Tamagni's testimony that petitioners came into New York City five times each year on the weekends and spent "three, four, five" Saturday nights in their Manhattan apartment is credible. What lends further credibility to this testimony is the nature of the apartment owned by petitioners at 29 East 64th Street: one of only 46 apartments at a prime Manhattan location, the apartment was certainly more than a simple pied-a-terre (given the fact that nearly all the tenants of the building were full-time tenants) and certainly an attractive place to spend a Saturday night after the theater or a dinner. Furthermore, the affidavits of the doormen do not alter this result. Edward Meade, one of the doormen, indicated that "it was extremely rare for me to see Mr. Tamagni on weekends." Fifteen weekends out of 156 weekends might well be viewed as an "extremely rare" presence by a doorman, especially in comparison to the other full-time residents of the building. Mr. Meade had also noted in his affidavit that "Mr. Tamagni is one of the very few who do not live at the building on a full-time basis."

Consequently, it is determined that, during each of the years at issue, petitioners spent eight weekend days in New York City: on at least three weekends they spent the Saturday night which equates to six days (because they were present in New York on Saturday and Sunday having spent the night in

the Manhattan apartment) plus two additional weekend days when they were present in the City for only a day. As noted in Conclusion of Law "E", Mr. Tamagni specified one weekend day in 1987 when he was present in New York City, two weekend days in 1988 and one in 1989. Therefore, the yearly totals of days present in New York State/City specified in Finding of Fact "15", which were based on Mr. Tamagni's testimony, are properly increased by seven days in 1987, six days in 1988 and seven days in 1989, resulting in the following totals:

	Days Present in New York City	Days Present in New York State
1987	179 days	183 days
1988	195 days	197 days
1989	184 days	188 days

H. As noted in Finding of Fact "17", petitioners contend that Mr. Tamagni did not go into work in New York City due to illness one or two days a year. They also contend, as noted in Finding of Fact "18", that petitioner also took an extended weekend (in addition to the long New Hampshire weekends and holiday weekends included in Finding of Fact "15") "once or twice". It is concluded that petitioners should be allowed one additional day outside New York based upon Mr. Tamagni's occasional sick day for each year at issue. However, no additional days outside New York should be allowed for extended weekends. In particular, it is noted that Mr. Tamagni's testimony of "once or twice" with regard to extended weekends was in response to attorney Rosen's leading question, "Once or twice?", which compounds the speculative nature of this line of questioning. Furthermore, Finding of Fact "15" discloses numerous "extended weekends" taken by petitioners during the years at issue so that Mr. Tamagni's testimony concerning additional extended

weekends is decidedly more speculative than his testimony concerning sick days he might have spent at home in New Jersey. Therefore, one additional day may be subtracted from the total number of days petitioners were present in New York State/City during the years at issue, which results in the final totals:

	Days Present in New York City	Days Present in New York State
1987	178 days	182 days
1988	194 days	196 days
1989	183 days	187 days

I. Since nondomiciled taxpayers who maintain an abode in New York must be present in New York State/City for more than 183 days to be treated as residents, as noted in Conclusion of Law "A", it is determined that for the year 1987 petitioners properly filed as nonresidents of New York State/City. However, for 1988, Mr. Tamagni was present in New York State/City more than 183 days so that petitioners must file as residents of New York State/City for such year, and, for 1989, although Mr. Tamagni may properly file a nonresident earnings tax report for purposes of New York City tax, petitioners were required to file as residents of New York State because Mr. Tamagni was present in New York State for more than 183 days in 1989.

J. For 1988 and 1989, the Division may amend its answer to assert, in the alternative, additional State and City income tax for 1988 and State income tax for 1989 based upon an increase in the allocation to New York of the partnership income of Lazard Freres and Co., of which petitioner John S. Tamagni was a partner. Amendments of pleadings are freely allowed so long as the opposing party has adequate notice if factual matters might be involved (see,

Matter of Clark, Tax Appeals Tribunal, September 14, 1992). In the matter at hand, as noted in Finding of Fact "23", the Division introduced into evidence a Statement of Personal Income Tax Audit Changes dated September 28, 1993 specifying the additional tax for 1988 and 1989 based upon the increase in the allocation of partnership income. Petitioners have introduced no evidence to contravene such increase. However, additional tax may be asserted under this alternative only to the extent of additional City tax of $201.57 for 1989 because, as noted in Conclusion of Law "I", it has been determined that petitioners must file as residents in 1988 and for purposes of 1989 State income tax.

K. During the years at issue, the tax rate for the New York City nonresident earnings tax on wages was .45% and for New York City nonresident earnings tax on net earnings from self-employment was .65%. In contrast, the tax rate for New York City personal income tax was significantly higher:[18]

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[18] New York City Administrative Code §11-1701(a)(1) sets forth the New York City income tax rates for resident married individuals filing joint returns. Petitioners' New York State adjusted gross income as reported by them on their respective returns was increased only incrementally as the result of the Division treating them as resident individuals of New York State/City. It is the much higher rate for New York City income tax, as compared to the New York City nonresident earnings tax, which resulted in the substantial additional tax that was asserted as due against petitioners. Consequently, petitioners' constitutional arguments, which are directed to an alleged failure to comply with a so-called "internal consistency" test because they would be taxed more than once on their intangible income if they were taxable as resident individuals, affects only a small portion of the additional taxes asserted as due. Moreover, although petitioners contend that they are questioning the constitutionality of Tax Law §605(b)(1) and its New York City Administrative Code counterpart as applied to them, in actuality they are challenging the constitutionality on its face of Tax Law §620(a), which allows a credit for income tax paid to another state, but which has been interpreted not to allow a credit for taxes paid on income from intangibles (see, Matter of Mallinckrodt, Tax Appeals Tribunal, November 12, 1992). *(Footnote Continued on Following Page)*

1987	1988	1989
$3,371.00 plus 4.1% of excess over $99,000.00	$3,335.00 plus 3.5% of excess over $108,000.00	$3,344.00 plus 3.4% of excess over $108,000.00

L. Petitioners have not established that negligence penalties should be abated (see, Matter of Etheredge, Tax Appeals Tribunal, July 26, 1990). As noted in footnote "6", Mr. Tamagni's review of his tax returns before signing was unduly casual given his professional position, educational background and high income. Furthermore, petitioners have maintained a New York City apartment since 1980 or 1981 and, as noted in Finding of Fact "21", Mr. Tamagni was aware of the possibility of being treated as a statutory resident of New York if he spent more than 183 days in New York. Given such knowledge, he should have maintained better documentation of his days in and out of New York. The fact that petitioners have prevailed at hearing with regard to a part of the period at issue does not alter this result. With better documentation, petitioners might have very well prevailed during the audit stage without the time and expense that both parties incurred from the need to conduct a formal hearing.

M. The Tax Appeals Tribunal has consistently held that once a hearing is completed, additional evidence should not be admitted (see, Matter of A & J Auto Repair Corp., Tax Appeals Tribunal, May 6, 1993). The Division contests the submission, after the hearing was completed, of attorney Rosen's "photocopy of the outline [he] used at the hearing for the direct examination of Mr. Tamagni." However, Mr. Rosen

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Therefore, petitioners' constitutional arguments may not be addressed given the lack of jurisdiction of the Division of Tax Appeals to determine the constitutionality of a statute on its face (see, Matter of Unger, Tax Appeals Tribunal, March 24, 1994).

submitted such document in order to support petitioners' interpretation of the transcript and not to prove facts in issue. For such limited purpose, the submission of such outline was not improper.

N. The petition of John S. and Janet B. Tamagni is granted to the extent indicated in Conclusion of Law "I" and the Notice of Deficiency dated July 6, 1992 is to be modified to so conform. In all other respects, the petition is denied.

APPENDIX E

Excerpts of Testimony By John S. Tamagni
Before the Division of Tax Appeals
September 28-29, 1993[1]

[80]

My name is John S. Tamagni, T-a-m-a-g-n-i. My address is 55 Oxbow, Lane, Summit, New Jersey.

* * *

[81]

Q. Mr. Tamagni, how long have you have lived at the address you just stated?

A. Approximately fourteen years.

* * *

[82]

Q. Mr. Tamagni, what do you do for a living?

A. I am an investment broker.

Q. Are you associated with a firm?

A. Yes.

Q. What firm is that?

A. Lazard Frères.

Q. Where is Lazard Frères' main office?

A. New York City

Q. Do you have an office?

A. Yes.

Q. Where is it located?

A. New York City.

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[1] This testimony is taken from pages 80-84 of the appendix prepared for the Petitioner's appeal to the New York Court of Appeals.

Q. In Lazard Frères' office complex?

A. Yes.

Q. How long have you been associated with Lazard Frères?

A. Twenty-one years.

Q. Can you tell us what your job entails on a day-to-day functioning basis?

[83]

A. Yes. I'm a partner in the municipal finance operation of Lazard Frères and the functions of that department and my own activities within it are to assist state and local government financing infrastructure or other capital needs.

* * *

Q. Do you believe you would have had a New York City apartment if you were not engaged in a business that required you to be in New York?

A. I do not.

Q. Why did you purchase the apartment?

[84]

A. Principally to provide a place that I could spend the night if I had been working late or to reduce the rigors of commutation from Summit, New Jersey.

Q. I apologize for this being out of order. You do have an apartment in New York City?

A. Yes.

Q. Can you tell us where it is located.

A. Located on 64th Street.

Q. And in what form do you own that?

A. A cooperative.

Q. When did you acquire the?

A. 1986.

Q. Do you believe you would have spent as much time in New York that you do spend if you were not associated with a business that had its main office in New York?

A. No.

APPENDIX F

New York City Administrative Code § 11-1705(b)

(b) City resident and city nonresident defined. (1) City resident individual. A city resident individual means an individual:

(A) who is domiciled in this city, unless (i) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or (ii)(I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this city for more than ninety days and does not maintain a permanent place of abode in this city at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (III) during any period of less than twelve months, which would be treated as a separate taxable period pursuant to section 11-1754, and which period is contained within such period of five hundred forty-eight consecutive days, he is present in this city for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such period of less than twelve months bears to five hundred forty-eight, or

(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

APPENDIX G

New York Tax Law § 605(b)

(b) Resident, nonresident and part-year resident defined. (1) Resident individual. A resident individual means an individual:

(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or (ii) (I) within any period of five hundred forty-eight consecutive days he is present in a foreign country or countries for at least four hundred fifty days, and (II) during such period of five hundred forty-eight consecutive days he is not present in this state for more than ninety days and does not maintain a permanent place of abode in this state at which his spouse (unless such spouse is legally separated) or minor children are present for more than ninety days, and (III) during the nonresident portion of the taxable year with or within which such period of five hundred forty-eight consecutive days begins and the nonresident portion of the taxable year with or within which such period ends, he is present in this state for a number of days which does not exceed an amount which bears the same ratio to ninety as the number of days contained in such portion of the taxable year bears to five hundred forty-eight, or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

No. 98-282

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1998

JOHN S. TAMAGNI and JANET B. TAMAGNI,

Petitioners,

-v.-

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMISSIONER OF TAXATION AND FINANCE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review a decision of the New York Court of Appeals that New York need not provide a credit for tax paid in other States on income derived from intangibles by nondomiciliary residents, when petitioners, New Jersey domiciliaries who were also New York residents during the tax years at issue, and who could have obtained a credit from New Jersey for tax paid to New York, have failed to demonstrate that they suffered any injury in fact attributable to New York's taxation of their income, and thus have failed to establish their standing to maintain the present proceeding.

2. Whether this Court should grant certiorari to review a decision of the New York Court of Appeals that New York's failure to provide a credit to nondomiciliary residents for income tax paid to other States on income derived from intangibles does not implicate the Commerce Clause of the United States Constitution, when (A) New York's treatment of nondomiciliary residents, even if it implicates interstate commerce, does not in any event discriminate against interstate commerce and therefore does not violate the Commerce Clause, and (B) the Court of Appeals correctly concluded that New York's taxation of nondomiciliaries who are also New York residents does not substantially affect interstate commerce.

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No.98-282

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN S. TAMAGNI and JANET B. TAMAGNI,
Petitioners,

-v-

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK and COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMISSIONER OF TAXATION AND FINANCE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

In addition to the provisions set forth by petitioners, the following statutes and regulations are involved:

N.Y. Tax L. § 620(a) (McKinney 1987) provides that

> [a] resident shall be allowed a credit against the tax otherwise due under this article for any income tax

> imposed for the taxable year by another state of the United States . . . upon income both derived therefrom and subject to tax under this article.

N.Y. Comp. Codes R. & Regs. tit. 20, § 120.1(a)(2) (1995) provides that the credit allowed a resident individual for income tax paid to another State

> is allowable only for that portion of the income tax . . . which is applicable to the income derived from sources within such other [State].

N.Y. Comp. Codes R. & Regs. tit. 20, § 120.4(d) (1995) excludes from the definition in § 120.1(a)(2) of tax paid on income derived from sources within another State any tax on

> income from intangibles, except where such income is from property employed in a business, trade or profession carried on in the other state.

STATEMENT OF THE CASE

New York "resident individuals" are liable for state income tax on all their income, regardless of its source. N.Y. Tax L. § 612 (McKinney 1987). A resident individual, according to the Tax Law, is either one "who is domiciled in this State" or one "who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state." *Id.* § 605(b).

It is therefore possible that New York and another State will treat the same individual, domiciled in one State but also residing in the other, as a "resident," and thus be empowered under the Due Process Clause of the United States Constitution to impose state tax on all his income, regardless of source, *see New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937). Most

States deal with this possibility as they do with the likelihood that many state residents will have income attributable to another State, *see, e.g.*, N.Y. Tax L. § 631 (McKinney 1987) -- by providing a credit against taxes paid to another State. Thus, for example, New Jersey provides its residents with a credit "for the amount of any income tax or wage tax imposed for the taxable year by another State of the United States * * * with respect to income which is also subject to tax" in New Jersey. N.J. Stat. Ann. § 54A:4-1(a) (West 1996). Similarly, New York provides that "[a] resident shall be allowed a credit against the tax otherwise due under this article [i.e. personal income tax] for any income tax imposed for the taxable year by another state of the United States, a political subdivision of such state, the District of Columbia or a province of Canada, upon income both derived therefrom and subject to tax under this article." N.Y. Tax L. § 620(a) (McKinney 1987). This credit applies only to income "derived from sources within another state [or] political subdivision of another state." N.Y. Comp. Codes R. & Regs. tit. 20, § 120.1(a) (1995). New York's definition of such income does not include "income from intangibles" such as stock dividends, unless "such income is from property employed in a business, trade or profession carried on in the other state." *See id.* § 120.4(d). Thus, New York may impose its income tax upon the income from intangibles of a resident who, as a domiciliary of another State, may also be required to pay tax to the domicile State on the same income.

Petitioners John S. and Janet B. Tamagni were, during the years at issue, domiciliaries of New Jersey (35).[1] Mr. Tamagni is an investment banker and a member of the firm of Lazard Freres, at whose main office he has worked since 1975 (7). During the years at issue, petitioners owned an apartment at 29 East 64th Street in Manhattan (7). For Mr. Tamagni, this apartment was "[p]rincipally * * * a place that I could spend the night if I had been working late or to reduce the rigors of commutation from Summit, New Jersey" (126-127). For Mrs. Tamagni, the apartment was an effort, albeit a "disappoint[ed]" one, to fulfill her "dream" of "be[ing] a 'New Yorker'" (343). For 1987, 1988 and 1989, petitioners filed New York State nonresident income tax returns, calculating their tax by allocating a percentage of their income to New York State (528-550). In each of those years, their income was approximately $2 million (29).

On March 3, 1992, the Division of Taxation of the New York State Department of Taxation and Finance issued three statements of audit changes to petitioners, showing income tax due of $64,115.51 plus penalty and interest for 1987; $70,353.28 plus penalty and interest for 1988; and $58,072.43 plus penalty and interest for 1989 (519-527). In each case, the additional tax was attributable primarily to the Department of Taxation and Finance's conclusions that "the taxpayers maintained a permanent place of abode in New York City [and] did not submit adequate records to establish that they spent less than 184 days in New York State and City," and that they were therefore subject to tax "as residents of New York State and City" (519, 522, 525).

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[1]Parenthetical citations are to the Record on Appeal in the New York Court of Appeals. Parenthetical citations preceded by letters are to the appendices to the petition for certiorari.

On October 5, 1992, petitioners filed a petition with the Division of Tax Appeals, contending that they were not in fact residents of New York during the years in question and that the statutory definition of residency in N.Y. Tax L. § 605(b)(1)(B) violated the Commerce Clause of the United States Constitution (509-515). On August 25, 1994, after a hearing, an Administrative Law Judge (ALJ) issued a decision concluding that petitioners were not present in New York State or New York City for more than 183 days in 1987, that they were present in both State and City for more than 183 days in 1988, and that they were present in New York State but not New York City for more than 183 days in 1989 (D-64-65). Thus, petitioners properly filed nonresident State and City returns for 1987 and a nonresident City return for 1989 (D-64-65). The ALJ declined to address petitioners' constitutional arguments in view of "the lack of jurisdiction of the Division of Tax Appeals to determine the constitutionality of a statute on its face" (D-66).

Petitioners filed exceptions to the ALJ's determination with the New York State Tax Appeals Tribunal. On November 30, 1995, the Tax Appeals Tribunal issued a decision affirming the ALJ's determination. This decision, like the ALJ's determination, centered on determining that petitioners qualified as New York residents (C-1-2). The Tribunal also addressed the constitutional issue raised by petitioners, concluding that petitioners had failed to show "how their domicile in New Jersey and their statutory residence in New York State constitutes interstate commerce" implicating the Commerce Clause (C-61).

On March 29, 1996, petitioners commenced in the Appellate Division, Third Department, a proceeding pursuant to N.Y. Tax L. § 2016 (McKinney 1987) challenging the Tax Appeals Tribunal's determination. On June 19, 1997, the Appellate Division issued an opinion and judgment confirming the Tax Appeals Tribunal's

determination. Like the Tribunal, the Appellate Division concluded "that the Commerce Clause is not implicated here" (B-3).

Petitioners appealed to the New York Court of Appeals, which on May 14, 1998, issued a decision affirming the judgment of the Appellate Division. The Court of Appeals concluded that New York's failure to grant petitioners a credit for taxes on income from intangibles paid to other States does not violate the Commerce Clause. The Court held that New York's residency statute "does not substantially affect interstate commerce and, therefore, the protections of the dormant Commerce Clause are not applicable" (A-1-2). Moreover, the Court of Appeals added, "[e]ven assuming arguendo that the Commerce Clause is implicated, the tax does not violate the dormant Commerce Clause because the tax does not facially discriminate against interstate commerce, and States have traditionally retained broad powers to tax their own residents" (A-2).

The Court of Appeals noted that, as this Court has held, "the Commerce Clause is implicated" if "the tax at issue 'substantially affects' interstate commerce" (A-7, quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)). The only activities that substantially affect interstate commerce are, the Court of Appeals said, "economic activities" (A-8). In the Court's view, "[t]he New York income tax is based upon a taxpayer's resident status, without regard to any specific commercial or economic transaction or activity" (A-8). The tax is imposed with regard to neither Mr. Tamagni's "commute" nor "the specific nature of his activities" in New York, but rather solely upon the basis of "his presence and maintenance of a permanent place of abode in New York, without regard to any economic activities incidental to his presence here" (A-8-9). According to the Court of Appeals, the fact that "commuters who do not own or lease property in New York are not subject to" taxation as residents "demonstrates that the tax is completely indifferent

to the interstate activities which [petitioners claim] are affected" (A-9). Thus, the Court concluded, "the interstate Commerce Clause is not implicated by the New York income tax" (A-9).

The Court of Appeals nonetheless proceeded to inquire further into the case by assuming that the Commerce Clause is implicated by state taxation of nondomiciliary residents (A-9). The Court below recognized that a violation of the so-called "dormant" or "negative" Commerce Clause[2] must be premised on "discrimination" against interstate commerce: "If there is no differential treatment of identifiable, similarly situated in-State and out-of-State interests, there is no dormant Commerce Clause violation" (A-10). Because " 'the dormant Commerce Clause protects markets and participants in markets, not taxpayers as such' " (A-11, quoting *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 824 (1997)), "the first step [in negative Commerce Clause analysis] is to identify the interstate market that is being subjected to discriminatory or unduly burdensome taxation," which in turn requires "identification of the similarly situated in-State and out-of-State interests which the tax treats differently" (A-11). The tax at issue in the present case, the Court of Appeals observed, "does not operate to the disadvantage of any identifiable interstate market, but rather simply taxes residents based on their status as residents" (A-12). Nondomiciliary residents are, the Court of Appeals said, "not similarly situated to New York domiciliaries" who reside nowhere else, for "[t]he former enjoy the privileges and protections of another State, and may therefore be subject to taxation by that State, which the latter do not" (A-12). "There is," the Court of Appeals said, "simply no similarly situated out-of-state interest

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[2] The Commerce Clause includes a "negative" component that prevents the States from interfering unduly with interstate commerce. *See, e.g., Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-80 (1995).

to compare to an in-state resident for purposes of applying a dormant Commerce Clause analysis" (A-14). Petitioners, in other words, "were taxed for being New York residents and not for their interstate activities" (A-14).

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE NOT ESTABLISHED THEIR STANDING TO MAINTAIN THIS PROCEEDING.

Because petitioners have not established their standing to bring this lawsuit, this Court lacks jurisdiction over the case. As this Court has recently noted, "Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies'," and "[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998) (cit om). "First and foremost" among the requirements of standing, "there must be alleged (and ultimately proven) an 'injury in fact' -- a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical." ' " *Id.* (cit om). The party invoking federal jurisdiction bears the burden of establishing injury in fact, *id.* at 1017, which " 'must affirmatively appear in the record,' " *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (cit om). The question of a party's standing may be raised at any point in the judicial process.[3] *See, e.g., Juidice v.*

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[3]Respondent raised the question of standing in the court below both in its brief and at oral argument. Presumably because New York courts face no state constitutional constraints on their jurisdiction by virtue of a party's lack of standing, *see, e.g., Society of Plastics Industry v. County of Suffolk*, 573 N.E.2d 1034, 1040 (N.Y. 1991), the Court of Appeals did not address the matter in its opinion.

Vail, 430 U.S. 327, 331 (1977) (Court inquired into standing, even though the issue was not raised by the parties).

The present petitioners have never established that they suffered a concrete harm as a result of New York's statutory scheme. The gravamen of their suit is that they face taxation of their income from intangibles by both New Jersey and New York.[4] Petitioners, however, never established that they actually paid tax to both States on the same income. They certainly were under no legal obligation to do so. New Jersey provides its residents with a credit for income tax imposed by another State "with respect to income which is also subject to tax" in New Jersey. N.J. Stat. Ann. § 54A:4-1(a) (West 1996). Petitioners could have claimed a credit from New Jersey for tax paid to New York on their income from intangibles, and nowhere in the record of this case do they indicate that they in fact paid tax on the same income to both States.

Petitioners (and all other New Jersey domiciliaries) thus do not face even a hypothetical injury, for the blanket credit offered by New Jersey for taxes paid on any income taxable by New York guarantees that those potentially liable for income tax to both States need never encounter double taxation. But in any event, petitioners have failed to establish any concrete, actual injury. For all that appears from the record, petitioners claimed the New Jersey credit to which they were entitled, and were doubly taxed on no portion of their income during the tax years in question. Petitioners therefore have not established that they suffered any injury in fact as a consequence of New York's failure to give them a credit for taxes paid to another State on their income from intangibles. Accordingly,

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[4]Petitioners suggest (Pet. pp. 14, 27) that the possibility of double taxation also arises when a nondomiciliary resident earns income from sources in a third State. It appears from the record that petitioners had no such income.

they do not have standing to invoke this Court's jurisdiction to entertain their petition.

II. THIS CASE HAS NO BEARING UPON THE STATUS OF NONRESIDENT INTERSTATE COMMUTERS, WHO IN ANY EVENT ARE FULLY PROTECTED FROM DISCRIMINATORY STATE TAXATION WITHOUT RECOURSE TO THE COMMERCE CLAUSE.

Petitioners do not argue that the decision below is in conflict with any decision of this or any other Court. Rather, as the first basis they offer this Court for granting their petition, petitioners erroneously suggest (Pet. p 14) that this case has significance for all "taxpayers who live in one state and work in another." Repeating this error elsewhere in the petition (pp 8-9), they claim that "the incidence of multiple taxation is a common and severe problem" for the "approximately four million interstate 'tax commuters' " -- a term that applies, as the article from which petitioners extract their "four million" figure makes clear, not to residents of more than one state, but rather to "individuals working outside their state." David Schultz, *State Tax Commuters: Classification and Estimates*, State Tax Notes, August 10, 1998, 355. Such nonresident "tax commuters" are liable for New York tax only on income "derived from or connected with New York sources." N.Y. Tax L. § 631(a) (McKinney 1987). They are not subject, even hypothetically, to the New York taxation of income from intangibles that is petitioners' sole source of grievance in this case. Far from raising an issue "of vital importance to countless individuals across the country" (Pet. p 14), petitioners' case has significance only for those who (1) qualify as residents of more than one State, (2) have income that is subject to taxation by both States, and (3) cannot obtain a credit from one State for all taxes paid to the other.

This is not a case, moreover, in which this Court must grant review lest States be "free to subject . . . nondomiciliary workers to discriminatory taxes" (Pet. p 24). For such people -- as this Court has recently demonstrated with respect to New York taxation of nonresidents -- the courts stand ready to provide complete constitutional protection against discriminatory state taxation without need for recourse to the Commerce Clause. *See Lunding v. Tax Appeals Tribunal*, 118 S. Ct. 766 (1998) (denial by New York to nonresident taxpayer of deduction available to New York residents for alimony payments was unjustified discrimination against nonresidents in violation of Privileges and Immunities Clause).

III. THERE IS NO REASON TO GRANT THE PETITION IN ORDER TO DETERMINE WHETHER THE COMMERCE CLAUSE IS IMPLICATED BY NEW YORK'S FAILURE TO PROVIDE A CREDIT FOR TAX PAID TO OTHER STATES ON INCOME DERIVED FROM INTANGIBLES BY NONDOMICILIARY RESIDENTS.

A. Because New York's Treatment of Nondomiciliary Residents does not in any Case Discriminate Against Interstate Commerce, There is no Reason for the Court to Grant the Petition in Order to Ascertain Whether New York's Taxation of Income from Intangibles Implicates the Commerce Clause.

The bulk of petitioners' argument in support of a grant of certiorari (Pet. pp 15-24) is devoted to their contention that this Court should review the case to determine whether New York's taxation of nonresident domiciliaries "substantially affects interstate commerce within the meaning of the Commerce Clause." As the decision of the New York Court of Appeals

makes clear, however, in the present case this can be viewed as an academic question. A taxpayer's claim that a state tax discriminates against interstate commerce always entails two inquiries: first, whether "dormant Commerce Clause jurisprudence is wholly inapplicable to th[e] case, because interstate commerce is not implicated," *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1596 (1997); and then, if interstate commerce is implicated, whether the tax "discriminates against interstate commerce," *id.* at 1598. The New York Court of Appeals engaged in precisely this analysis, finding that interstate commerce was not implicated by New York's taxation of nondomiciliary residents, but then, "assuming arguendo that the Commerce Clause is implicated," finding that the tax does not in any case "discriminate against interstate commerce" (A-2). Because, as the New York Court recognized, it is easy to show that New York's taxing scheme does not discriminate against interstate commerce, the question of whether the Commerce Clause is implicated at all lacks practical significance in this case.

As this Court has noted, "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 824 (1997). In the present case, petitioners, as New Jersey domiciliaries who are also New York residents, are similarly situated neither to New Jersey domiciliaries who work but do not reside in New York nor to New York domiciliaries who work in either State and reside only in New York. Rather, their situation is analogous only to that of New York domiciliaries who also reside in New Jersey, and who face exactly the same tax liability (including the benefit of a New Jersey tax credit) faced by petitioners. According to this Court, " '[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are. . similarly situated.' " *Camps Newfound*, 117 S. Ct. at 1601 n 16 ((quoting *id.*

at 1611) (Scalia, J., dissenting)) (brackets and ellipsis in majority opinion). As residents of two States, petitioners are not similarly situated to those who reside only in the State in which they are domiciled. Their status as dual residents, the Court below recognized, both entitles them to "the protections and services which [each] State affords [only] its residents" (A-15) and subjects them to state taxes that nonresidents do not face (A-16), *see, e.g.*, *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) (States may tax residents on their worldwide income but may tax income of nonresidents only insofar as it is derived from in-state sources).

Thus, the difference between New York's treatment of petitioners and of New York nonresidents with New York income is justified by petitioners' status as New York residents. Because petitioners are New York residents, they are not similarly situated to nonresidents with New York income and do not under any circumstances face "discrimination" under the Commerce Clause when compared with such nonresidents. Accordingly, even if the Commerce Clause is implicated in this case, petitioners cannot prevail, and there is no reason to grant the petition simply to ascertain whether New York's taxation of the income from intangibles of nondomiciliary residents "substantially affects" interstate commerce.

B. The Court Below Correctly Concluded that New York's Taxation of Nondomiciliary Residents does not Substantially Affect Interstate Commerce.

Even if the issue of whether the Commerce Clause is implicated by New York's taxation of nondomiciliary residents had independent significance in the present case, it would not justify a grant of the petition. The New York Court of Appeals correctly noted that the income tax on petitioners "is imposed solely based upon [their] presence and maintenance of a permanent place of abode in New York, without regard to any

economic activities incidental to [their] presence here" (A-9). Unless a nondomiciliary's mere physical presence in a State is sufficient to trigger Commerce Clause scrutiny, the Court of Appeals' decision on this point was correct and need not be re-examined.

Even on petitioners' own terms, moreover, the activities on which they rely do not qualify as interstate commerce. Their strategy is to extend the coverage of the Commerce Clause to those activities simply by virtue of the fact that, if petitioners had not at some point traveled from New Jersey to New York, they would not have engaged in the activities. Thus, they contend (Pet. p 22) that their "purchase and maintenance" of a New York apartment involved them in interstate commerce and that merely spending sufficient time in New York to qualify as residents "involves participation in interstate commerce" through their routine purchase of goods and services. No court, however, has ever held that a State's residents, simply by purchasing residential property and buying at retail goods and services for personal consumption, are *themselves* engaged in interstate commerce. Petitioners never explain how these activities, when conducted by a nondomiciliary resident, necessarily involve interstate commerce any more than a domiciliary's would.

Similarly, petitioners contend (Pet. p 21) "that Mr. Tamagni's presence in New York was a result of his employment in the state [cit om] and employment is an inherently commercial enterprise involving multistate economic competition and opportunities." There is, of course, no doubt that Mr. Tamagni, in his work as an investment banker, is, like his New York domiciliary partners, engaged in interstate commerce. But it is another matter altogether to suggest that the Commerce Clause is inherently implicated *by virtue of* Mr. Tamagni's status as a New Jersey domiciliary who also is employed in New York. The very notion of "interstate

commerce" suggests that there is some other zone of activity that qualifies as "intrastate commerce." And it is the nature of the commerce itself, rather than the domiciles and residences of those who engage in it, that characterizes it as interstate or intrastate. If petitioners are correct (Pet. p 22), and interstate commerce is "affected" by virtue of "the relationship between Mr. Tamagni's job in New York, his home in New Jersey, and the decision to obtain the apartment in New York," then similarly the character of an intrastate enterprise in New York will change as soon as the enterprise hires a New Jersey domiciliary, and change again if the employee moves to New York, even as an intrastate enterprise doing the identical business next door will undergo no changes as long as its personnel remain stationary.

Thus, petitioners err in suggesting that their specific activities in New York implicate the Commerce Clause. Nor, as they mistakenly suggest (Pet, pp 19-20), does the decision of this Court in *Camps Newfound/Owatonna* demonstrate that the Tamagnis, simply by crossing state lines, are entitled to Commerce Clause protection. In *Camps Newfound*, the petitioner was a nonprofit corporation operating a Maine summer camp for children, most of whom were from outside of Maine. The camp successfully argued that a Maine statute providing a general exemption from real estate and personal property taxes for charitable institutions incorporated in Maine, but denying the exemption to charitable institutions operated principally for the benefit of nonresidents, discriminated against interstate commerce.

The State of Maine argued that the camp was not engaged in interstate commerce. This Court disagreed, finding that the camp was engaged in commerce "as a purchaser" and as "a provider of goods and services." 117 S. Ct. at 1596. Moreover, "[t]he attendance of these campers necessarily generates the transportation of persons across state lines that has long

been recognized as a form of 'commerce.' " *Id.* The Court likened summer camps to "hotels that offer their guests goods and services that are consumed locally," but are nonetheless deemed to be engaged in interstate commerce. *Id.* at 1597.

This summary makes clear that the decision in *Camps Newfound* has no application to the present case. It is of no consequence that the camp was deemed to be engaged in interstate commerce. So, undoubtedly, is the New York investment bank in which Mr. Tamagni is a partner, and so it would be if it were a nonprofit investment bank. So, too, are the businesses from which the Tamagnis purchased goods and services in New York or New Jersey. There is no question that the enterprises that "generate" the Tamagnis' travel across state lines are engaged in commerce, as is any business that assists in that travel. But these facts are immaterial. For *Camps Newfound* to have bearing on the present case, this Court would have had to conclude that *the nonresident campers themselves*, simply by virtue of traveling to Maine, were engaged in interstate commerce. Such a perspective is neither explicit nor implicit in *Camps Newfound* or anywhere else; indeed, this Court has expressly rejected it. *See United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting Commerce Clause as basis for Congress' authority to outlaw possession of firearm in "school zone," despite contention that "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe").

The New York Court of Appeals correctly concluded that an income tax based on a taxpayer's status as a New York resident simply does not implicate the Commerce Clause. This Court has never suggested that a State's residents, whatever their domicile, engage in interstate commerce merely by engaging in retail consumption or employment within the State. There is no need for this Court to grant certiorari to examine this self-evident conclusion.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
September 3, 1998

Respectfully submitted,

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